SVEA HOVRÄTT
Avdelning 02
Rotel 020103

DOM
2011-09-21
Stockholm

Mål nr
T 2418-07

KÄRANDE
Tiscali International B.V.
Papendorpseweg 83
3503 RB Utrecht
Nederländerna

Ombud: Advokaterna Jonas Benedictsson och Stefan Brandt
Box 180
101 23 Stockholm

SVARANDE
Yarps Network AB, 556541-5360
Adress hos ombuden

Ombud: Advokaterna Jakob Falkman och Gustaf Swedlund
Box 2278
103 17 Stockholm

SAKEN
Klander av skiljedom

KLANDRAT AVGÖRANDE
Skiljedom meddelad i Stockholm 2006-12-28 i Stockholms Handelskammares Skiljedomsinstituts mål V (006/2006)

HOVRÄTTENS DOMSLUT

1. Hovrätten lämnar käromålet utan bifall.
2. Tiscali International B.V. ska ersätta Yarps Network AB för dess rättegångskostnader i hovrätten med 935 923 kr, varav 900 000 kr avser ombudsarvode, jämte ränta enligt 6 § räntelagen från dagen för hovrättens dom till dess betalning sker.

Postadress	Besöksadress	Telefon	Telefax	Expeditionstid
Box 2290 103 17 Stockholm	Birger Jarls Torg 2	08-561 670 00 08-561 675 00 **E-post:** svea.avd2@dom.se www.svea.se	08-561 675 09	måndag – fredag 09:00-15:00

BAKGRUND

Tiscali International B.V. (Tiscali), och Yarps Network AB (tidigare Spray Network AB, nedan Spray), ingick den 27 augusti 2004 ett aktieöverlåtelseavtal (Avtalet) enligt vilket Spray förvärvade samtliga Tiscalis aktier i det svenska dotterbolaget Tiscali AB. Överlåtelsen fullbordades den 30 september 2004. I Avtalet finns en skiljeklausul.

Den 24 januari 2006 påkallade Spray skiljeförfarande vid Stockholms Handelskammares Skiljedomsinstitut gentemot Tiscali. Spray yrkade att Tiscali skulle förpliktas att utge 4 932 000 kr jämte ränta och ersättning för kostnader. Anspråket avsåg krav på ersättning för dubbelbokföring av intäkter i Tiscali AB som skett under perioden april-september 2004. Dubbelbokföringen av intäkter utgjorde enligt Spray ett brott mot Avtalets garantibestämmelser och innebar att Spray orsakats skada eftersom intäkterna i Tiscali AB behövt skrivas ned i motsvarande mån. Spray sökte ersättning i enlighet med artikel 9.1 i Avtalet som stipulerar att köparen i händelse av garantibrott från säljarens sida som enda gottgörelse har rätt till ersättning med ett belopp som motsvarar alla kostnader eller skador, underskott eller utgifter samt skäliga rättegångskostnader som uppkommer. Skiljenämnden meddelade skiljedom den 28 december 2006. Genom domen förpliktades Tiscali att till Spray utge det yrkade beloppet.

Tiscali har väckt talan och yrkat att den mellan parterna meddelade skiljedomen ska upphävas eftersom skiljemännen har överskridit sitt uppdrag alternativt att ett handläggningsfel, som har inverkat på utgången, har förekommit. Inledningsvis bestred Spray Tiscalis talan och yrkade i första hand att talan skulle avvisas då Tiscali förlorat sin rätt att klandra skiljedomen alternativt saknar klanderintresse på grund av att de utdömda beloppen betalats utan förbehåll. I andra hand yrkade Spray att talan skulle ogillas på samma grund. Spray invände vidare att varken behörighetsöverskridande eller handläggningsfel hade förekommit under skiljeförfarandet.

Hovrätten beslutade den 7 april 2008 att följderna av Tiscalis betalning i enlighet med skiljedomen inte skulle prövas som en invändning om rättegångshinder utan som en del av målet i sak.

Spray återkom till ett tidigare framställt yrkande om att mellandom skulle ges i frågan om Tiscali förlorat sin klanderrätt, vilket Tiscali motsatte sig. Hovrätten avslog den 10 oktober 2008 yrkandet om mellandom. Målet sattes ut till en huvudförhandling, som med kort varsel fick ställas in.

Spray framställde härefter ett nytt yrkande om mellandom, denna gång i fråga om Tiscalis klandergrunder. Tiscali hade ingen erinran mot detta. Även hovrätten fann det lämpligt att pröva Tiscalis klandergrunder genom mellandom.

Hovrätten fastställde i mellandom den 24 januari 2011 att skiljemännen inte har överskridit sitt uppdrag och utfärdat skiljedom över mer/och eller annat än parterna i behörig ordning har yrkat och åberopat; samt att det under förfarandet inte har, utan parternas vållande, förekommit fel i handläggningen som sannolikt har inverkat på utgången i målet.

YRKANDEN I HOVRÄTTEN

Tiscali har yrkat att hovrätten ska upphäva den mellan parterna meddelade skiljedomen.

Spray har bestritt yrkandet.

Båda parter har yrkat ersättning för sina rättegångskostnader.

GRUNDER FÖR TALAN

Tiscali

Skiljemännen har överskridit sitt uppdrag genom att utfärda skiljedom över mer och/eller annat än parterna i behörig ordning har yrkat och åberopat (34 § första stycket 2 lagen (1999:116) om skiljeförfarande [LSF]). Skiljenämnden har omtolkat Sprays talan från att vara ett krav på ersättning för skada som orsakats av en kostnad till att avse någon slags kontraktuell justeringsmekanism. Härigenom har skiljenämn-

den tillfört ett inte åberopat rättsfaktum vilket innebär att skiljenämnden överskridit sitt uppdrag.

Under förfarandet har, utan parternas vållande, i handläggningen förekommit fel som sannolikt inverkat på målets utgång (34 § första stycket 6 LSF). Handläggningsfelet består i det ovan angivna och även följande. Under alla förhållanden har skiljenämnden utgått från en rättslig utgångspunkt som helt skiljer sig från den rättsliga utgångspunkt som parterna haft. Skiljenämnden borde därför ha kommunicerat sin avvikande rättsliga utgångspunkt för att bereda parterna tillfälle att argumentera i frågan. Så har emellertid inte skett och skiljenämnden har därmed underlåtit att bedriva erforderlig processledning, vilket har inverkat på målets utgång.

Spray

Tiscalis talan ska i första hand lämnas utan bifall på grund av att Tiscali har förlorat sin klanderrätt alternativt saknar klanderintresse. Tiscali har innan talan väcktes vid hovrätten utan reservationer fullgjort den betalningsskyldighet som Tiscali ålagts genom skiljedomen. Redan med hänsyn till detta får Tiscali anses ha godtagit skiljedomen och således förlorat sin rätt att klandra den. Tiscali får i vart fall med hänsyn till de kontakter som förevarit mellan parterna efter skiljedomens meddelande i förening med de förbehållslösa betalningarna anses ha godtagit skiljedomen och har även av denna anledning förlorat eller avstått från sin rätt att klandra skiljedomen.

I andra hand gör Spray gällande att Tiscalis talan ska lämnas utan bifall eftersom skiljenämnden inte har överskridit sitt uppdrag. Spray bestrider även att det förekommit något fel i handläggningen. Än mindre har det förekommit något fel som sannolikt har inverkat på utgången.

HOVRÄTTENS DOMSKÄL

Hovrätten har företagit målet till avgörande utan huvudförhandling med stöd av 42 kap. 18 § första stycket 5 jämfört med 53 kap. 1 § rättegångsbalken.

Med hänsyn till att hovrätten i mellandom har fastställt att det inte har förekommit några sådana fel i skiljeförfarandet som Tiscali har åberopat till stöd för sin talan, ska käromålet lämnas utan bifall.

Vid denna utgång ska Tiscali förpliktas att ersätta Spray för dess rättegångskostnader i hovrätten.

Spray har yrkat ersättning för rättegångskostnader med 1 733 000 kr avseende ombudsarvode och 35 923 kr avseende övriga kostnader, allt exklusive mervärdesskatt.

Tiscali har vitsordat 300 000 kr som skäligt i och för sig och anfört att bolagets egna rättegångskostnader uppgår till 460 000 kr och att det inte finns skäl för att Sprays kostnader skulle överstiga detta belopp. Därtill kommer att mycket av Sprays argumentation har handlat om att Tiscali skulle ha förlorat klanderintresset. Spray framförde inledningsvis att Tiscalis talan skulle avvisas på denna grund och yrkade därefter att hovrätten genom mellandom skulle avgöra frågan. Hovrätten avslog yrkandena. I dessa delar har Spray således förlorat målet.

Spray har genmält att det varit fullt påkallat att göra invändning om att Tiscali förlorat sitt klanderintresse och framhållit att det sedermera var på Sprays förslag som frågan om fel förekommit i skiljeförfarandet kom att prövas genom mellandom, vilket visade sig vara ett lämpligt och kostnadseffektivt sätt att avgöra målet. En prövning av frågan om Tiscalis klanderintresse har härigenom blivit överflödig.

Hovrätten gör följande bedömning.

Enligt 18 kap. 8 § rättegångsbalken ska ersättning för rättegångskostnad fullt motsvara kostnaden för rättegångens förberedande och talans utförande jämte arvode till ombud eller biträde, såvitt kostnaden skäligen varit påkallad för tillvaratagande av partens rätt. Ersättning ska enligt samma lagrum också utgå för partens arbete och tidsspillan i anledning av rättegången.

Beträffande kostnaden för ombudsarvode är att beakta att ersättningen inte, som är fallet med ersättning till rättshjälpsbiträde, i första hand ska bestämmas efter nedlagd tid. Sådan ersättning ska bestämmas med hänsyn till bland annat målets beskaffenhet och omfattning samt till den omsorg och skicklighet med vilken arbetet har utförts. Därvid kan även beaktas sådana omständigheter som tvisteföremålets värde och den betydelse som målets utgång i övrigt haft för parten (NJA 1997 s. 854).

Spray har utfört sin talan med tillfredsställande omsorg och skicklighet. Det kan inte anses obefogat att Spray som svarande gjorde invändningen om bristande klanderintresse. Spray har vidare på ett konstruktivt sätt sökt att föra handläggningen av målet framåt i syfte att begränsa omfattningen av hovrättens prövning. Hovrätten anser dock att den yrkade ersättningen för ombudsarvode framstår som väl hög med hänsyn till målets beskaffenhet och omfattning samt tvisteföremålets värde. Vid en samlad bedömning finner hovrätten att en ombudskostnad på 900 000 kr jämte yrkad ersättning för övriga kostnader med 35 923 kr, allt exklusive mervärdesskatt, får anses skäligen påkallade för tillvaratagande av Sprays rätt.

Hovrättens avgörande får enligt 43 § andra stycket LSF inte överklagas.

I avgörandet har deltagit hovrättslagmannen Kristina Boutz samt hovrättsråden Måns Edling, referent, och Anna-Karin Winroth. Enhälligt.

AWARD

in the matter of an arbitration under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Case No. V (006/2006) between

Spray Network AB
(Sweden)
Claimant

v.

Tiscali International B.V.
(the Netherlands)
Respondent

before an Arbitral Tribunal composed of

Advokat Christer Söderlund, Chairman
Advokat Björn Tude, Arbitrator
Advokat Lars Boman, Arbitrator

Stockholm, 28 December 2006

INNEHÅLLSFÖRTECKNING

AWARD

1 THE PARTIES

1.1 Spray Network AB is an European media company, focused on interactive consumer services (hereinafter "the Claimant" or "Spray"). It is domiciled in Stockholm, Sweden, and it is represented in this arbitration by

Jakob Falkman and Gustaf Swedlund, *Legal Counsel*

1.2 Tiscali International B.V., (hereinafter "the Respondent" or "Tiscali International") is a company focused on delivering voice and other transit services to the wholesale market in Europe, North America and Asia. Its registered office is in Utrecht, The Netherlands, and it is represented in this arbitration by

Jonas Benedictsson and Stefan Brandt, *Legal Counsel*

2 THE PROCEEDINGS

2.1 Introduction

The Claimant has filed a Request for Arbitration ("Request") of the 24 January 2006 with the Stockholm Chamber of Commerce (hereinafter the "SCC Institute"), where it was allotted Case No. V(006/2006). The Request made reference to a Share Purchase Agreement ("the SPA") of 27 August 2004 regarding the Claimant's purchase of all shares in Tiscali AB ("Tiscali") from Tiscali International.

2.2 Article 11.9 of the SPA includes an arbitration clause of the following wording

> ***Article 11.9 Dispute Resolution***
> Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in Stockholm in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal shall be composed of three arbitrators. The language to be used in the arbitral proceedings if so requested by a Party shall be English. Evidence may, however, be presented in English or Swedish as the case may be.

2.3 In its Request the Claimant appointed advokat Björn Tude as arbitrator.

2.4 Under cover letter of 26 January 2006, the SCC Institute communicated the Request to the Respondent, requesting a reply pursuant to Article 10 of the

Arbitration Rules of the SCC Institute (the "SCC Rules"). The Respondent filed its reply with the SCC Institute on 9 February 2006. In the reply, the Respondent appointed advokat Lars Boman as arbitrator.

2.5 In a letter of 9 March 2006, the SCC Institute informed that it had appointed advokat Christer Söderlund as Chairman of the Arbitral Tribunal. The appointment was made pursuant to § 13 (a) of the SCC Rules.

2.6 Under cover letter of 19 April 2006, the SCC Institute referred the case to the Tribunal.

3 CONSTITUTION OF THE ARBITRAL TRIBUNAL

3.1 In its Procedural Order No.1 of 24 April 2006 the Tribunal determined, respectively, confirmed certain procedural issues concerning the arbitration according to, *inter alia*, the following.

- **Constitution of the Arbitral Tribunal**
  Each of the arbitrators declared that he was not aware of any circumstance giving rise to justifiable doubts as to his impartiality or independence in the present arbitration.
- **Place of Arbitration**
  The place of arbitration was to be Stockholm, Sweden.
- **Language of Arbitration**
  The language of the arbitration was to be English.
- **Applicable law**
  The Parties had agreed to apply Swedish law as the governing law.
- **Arbitral Procedure**
  The procedure was to be governed by the SCC Rules and the Parties' agreements consistent herewith, and additionally, to be determined within the sound discretion of the Tribunal.
- **Powers of the Chairman of the Tribunal**
  The Chairman of the Tribunal was to be empowered to make procedural rulings alone.
- **Agenda**
  Moreover, the Tribunal fixed an agenda for the initial submissions by the Parties in the arbitration.

3.2 The Arbitral Proceedings

3.2.1 The procedural events which occurred after the Tribunal issuing its Procedual Order No. 1 shall be described as follows.

3.2.2 The Claimant submitted its Statement of Claim on 24 January 2006.

3.2.3 In accordance with the Tribunal's Procedural Order No. 2 of 24 May 2006, the Claimant submitted an additional statement, CIII.

3.2.4 A case management meeting took place on 27 June 2006. The following procedural timetable was agreed on: The Respondent to file its Statement of Defence on 4 September 2006. The Claimant (if it considers necessary) to submit a written rejoinder on 2 October 2006, and the Respondent (if it considers necessary) to submit a final Rebuttal on 23 October 2006.

3.2.5 A the meeting it was further decided that the Tribunal should submit a request to the SCC Institute for a time extension until 31 December 2006. By letter of 12 July 2006, the SCC Institute informed the Tribunal that the time for rendering the Award had been extended until 2 January 2007.

3.2.6 With some minor departures, the procedural timetable agreed on 27 June 2006 was adhered to. A Final Hearing was finally scheduled for 16 and 20 November 2006.

4 THE SUBMISSION OF THE PARTIES

4.1 The Claimant's Request for Relief

The Claimant has requested that the Tribunal order the Respondent to pay an amount of SEK 4,932,000 together with interests thereon according to Articles 4 and 6 of the Swedish Interest Act from 27 March 2005 until payment in full. The capital amount includes the cost for legal fees in the amount of SEK 50,000 relating to the investigation phase of the claim.[1]

Further, the Claimant has requested reimbursement of its costs in the arbitration together with interests thereon according to Article 6 of the Swedish Interest Act from the day of the arbitral award until payment in full.

4.2 Respondent's position

The Respondent has denied the Claimant's Request for Relief. No amounts are admitted as such. Interest is admitted as such from the date of receipt of the Request, i.e. from 26 January 2006.

Further, the Respondent has requested reimbursement of its costs in the arbitration.

[1] Article 9.1 of the SPA

4.3 The Claimant's presentation of factual and legal circumstances

4.3.1 *The accounting mistake*

At the end of February 2005 the Claimant became aware of the fact that Tiscali's books contained a double entry of revenue as per 30 September 2004 of about SEK 5.1 million, relating to the ADSL product.

4.3.2 *Notice of the Warranty Claim*

A Notice of Warranty Claim was sent to the Respondent on 24 February 2005 by telefax and confirmed by registered mail. As follows from the SPA, the Notice of Warranty Claim shall therefore be considered to have been received by the Claimant on 24 February 2005. According to Article 6, paragraph 3 of the Swedish Interest Act, interest is payable on a claim for damages from the 30th day after receipt of a claim which has been accompanied with such details as reasonably required. Accordingly, the Respondent shall pay interest on the capital amount from 27 March 2005.

4.3.3 *The erroneous accrual of revenue*

When Tiscali's customers were invoiced for use of services in April, these revenues for April 2004 were correctly booked as accounts receivable in the books of Tiscali. However, Tiscali also booked the revenues for the same period as accrued revenue, i.e., earned but not yet invoiced revenues, for the same monthly period. This was an accounting mistake which continued to occur each month during the Respondent's remaining ownership of Tiscali. The Claimant considers this as a systematic default in the booking logic.

The recurrence of the erroneous accrual is explained by the following circumstances.

Before April of 2004, Tiscali had applied a floating billing routine, meaning that the billing period for each customer started on the contract date and ran for 30 days, whereafter an invoice for the past 30 day period was issued to the customer (payment in arrears). This routine necessitated – in order to determine relevant end-of-month results – that an assessment of accrued revenue on existing contract was made as per that date. From April of 2004 the routine was changed; customers were billed on a monthly basis – irrespective of the individual contract date – and in advance. This change of routine obviously implied that no accrued revenue relating to the ADSL product had been earned. Irrespective hereof, by an oversight, accrued revenue continued to be applied on the basis of the previously applied basis.

4.3.4 *The breach of warranty*

The erroneous accrual, accounted for above, constitutes a breach of warranty by the Respondent under the SPA, and this breach has caused a cost for the Claimant.

By way of Tiscali's accounting mistake the Claimant has incurred a cost in the amount of SEK 5,100,000 as per the Closing Date, i.e. 30 September 2004, which is due to the Claimant, which had to eliminate the double entry by decreasing the overstated revenue in Tiscal AB's books.[2]

Specifically, the erroneous accrual constitutes a violation of the following warranties in the SPA: Article 6.2 (Warranty in respect of Books and Records), Article 6.5 (Warranty in respect of Accounts), in particular Articles 6.5.1, 6.5.3 (a), (b), (c) and (i), 6.5.4, 6.5.6 and 6.5.8, and Article 6.20 (Warranty in respect of Information).

4.3.5 *Remedies under the SPA – liability for damages*

According to Article 9.1 of the SPA it is provided that

> "[s]ubject to Section 9.2 below, in the event of a breach of any of the Warranties by the Seller, the Buyer shall as the sole and exclusive remedy be entitled to an amount corresponding to all costs or losses, deficits or expenses and reasonable legal fees ("Deficiency") of the Company, the Affiliates or the Buyer, arising out of any misrepresentations, breach of warranty or failure to perform a covenant or other breach of this Agreement. Hence it is specifically agreed that no remedy under the Swedish Sale of Goods Act (Sw. Köplagen 1990:931), as amended shall be available to the Buyer. It is specifically agreed between the Parties that solely for purpose of establishing whether a threshold as set out in Section 9.2 below has been reached or exceeded, any costs for legal fees shall be excluded when calculating the amount of the Deficiency".

The accounting mistake committed by Tiscali, which caused the overstated revenues regarding ADSL customers on which the Claimant's warranty claim is based, did not cause any corresponding overstated costs or there was no connection between the overstated revenues and any alleged overstated costs.

Even if there would be some link between the overstated revenues and the alleged overstated estimated costs, this is of no relevance for the Claimant's warranty claim under the SPA.

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[2] For purposes of simplification, the Claimant has reduced its claim relating to the erroneous accrual to SEK 4,882,00, to which amount the Respondent has stipulated.

The alleged overstated direct costs referred to in the Deloitte report, invoked by the Respondent, have nothing to do with the fact that Tiscali prior to April 2004 invoiced its ADSL customers in arrears. That does not mean that Tiscali "thus" had to estimate costs in the monthly records. Neither does the accounting mistake made by the temporary employee of Tiscali, when invoicing ADSL customers, have anything to do with the alleged overstated direct costs. The alleged overstated direct costs have nothing to do with the change of billing routines from billing in arrears to billing during the actual month of use. Neither do they have anything to do with the accounting mistake made in April 2004 and onwards, which meant that despite actually having billed the customers during one calendar month for their use during the same calendar month, a book entry of accrued revenues was also made for the same calendar month.

There is no overstated cost with respect to the Telenor invoices and no booking mistake in respect of Telenor invoices. In case there should be such a mistake, it is something, which concerns costs related to Tiscali's Dial-up product, an entirely different product from the ADSL-product, to which the erroneous accrual relates. When Tiscali changed its invoicing principles in April 2004, in which connection the accounting mistake regarding overstated revenues occurred, this only concerned the invoicing of ADSL customers. As regards Dial-up customers, to which the Telenor invoices relate, no change was made in respect of the invoicing of customers. Accordingly, there is no connection whatsoever between the two booking mistakes, if, indeed, there is an actual booking mistake in respect of Telenor invoices.

With respect to the Skanova invoices, it is, as such, correct that an accounting mistake has been made by Tiscali at least since the beginning of 2003 and that this accounting mistake led to overstated costs for Skanova in an amount of SEK 3,464,000 as per 30 September 2004. This accounting mistake, however, has nothing to do with the erroneous accrual of revenue.

None of the alleged accounting mistakes regarding costs could in any way be related to the accounting mistakes regarding overstated revenues, which occurred for the first time in April of 2004.

The Claimant acknowledges that the amount of overstated direct cost for Skanova as per 30 September 2004 was SEK 3,464,000.

4.3.6 *The Closing Accounts*

The provisions of the SPA regarding Closing Accounts[3] have no bearing on the Claimant's right to indemnification based on breach of warranty.

[3] Article 5 of the SPA

The Claimant participated in a controlled auction process conducted by the Respondent during May – August 2004. As a consequence, the Parties entered into the SPA, which was the result of ordinary business negotiations where each Party had to give up in certain respects in order to receive benefits in others. During the Parties' negotiations on how to deal with changes in the Net Working Capital between 31 March 2004, per which date figures were available, and the Closing, which took place as of 30 September 2004, the Parties agreed that a comparison should be made between the 31 March Net Working Capital and the Closing Net Working Capital as shown by the Closing Accounts. If the Closing Net Working Capital was less than SEK 16,000,000, the Claimant would be entitled to compensation from the Respondent.

In addition to Article 5.2 of the SPA, containing provisions regarding a purchase price adjustment due to changes in the Net Working Capital, the SPA includes a number of separate and independent warranties and provisions to the effect that, in case of a breach of such warranty, the Respondent shall compensate the Claimant for any loss or cost incurred as a result of the breach.

According to the SPA, the Respondent is obliged to pay compensation for such damage and this irrespective of whether the Net Working Capital requirement has been fulfilled or not. The Net Working Capital adjustment mechanism has nothing to do with the Respondent's obligation to pay compensation for breach of warranties that occurred because of to the accounting mistake.

If, however, the delivery of the Closing Accounts could be of any importance for the Claimant's claim, the Claimant notes that since the Respondent waited until March 2005 to mention that the Respondent was of the view that the Closing Accounts had not been timely delivered, the Claimant's handling of the Closing Accounts shall not have an impact on the Claimant's right to make claims due to breach of warranties and to obtain compensation for such breaches. Consequently, the delivery of the Closing Accounts is not relevant for the Claimant's claim in the present dispute.

4.3.7 *The production and delivery of Closing Accounts*

The Closing Accounts have no importance for the Claimant's right to obtain compensation due to breach of warranties in the SPA.

The Claimant was not obliged to ensure that the Closing Accounts were produced or delivered. As appears from the SPA, the Parties had agreed to jointly assign to Tiscali the task of producing and delivering Closing Accounts.

However, the Closing Accounts have been produced and delivered to the Respondent. Tiscali produced, with the assistance from the Tiscali Group, the Closing Accounts following Closing. The Closing Accounts contained detailed and complete information regarding profit, loss, assets and debts of Tiscali as per 30 September 2004 and accordingly meets the requirements for Closing Accounts as set out in the SPA. Furthermore, the Closing Accounts were audited by KPMG in October 2004.

As follows from the Review report of KPMG, the overstated revenues were not detected in October 2004. The Claimant noticed the overstated revenues and the accounting mistake in February 2005. Tiscali's and the Respondent's auditor Deloitte did not detect the various errors in Tiscali's accounting until the facts were presented to them during the summer 2005. The same applies to the accounting mistakes relating to costs for Skanova, which had been going on for years within Tiscali. Apparently Deloitte did not notice this error even in their annual audit for the financial year 2003.

Tiscali delivered the Closing Accounts to the Respondent via the Tiscali Group's internal reporting system. The Respondent reviewed the September 2004 figures and used the information contained therein to produce its own September 2004 figures.

The Closing Accounts showed that the Closing Net Working Capital was approximately SEK 24,000,000, which was well above SEK 16,000,000. Consequently, the Closing Accounts did not entitle the Claimant to compensation for lack of Net Working Capital under the adjustment mechanism for Net Working Capital in Article 5.3 of the SPA. Obviously, Article 5.2 of the SPA was therefore of no relevance.

Furthermore, if the Respondent has been of the view that the Closing Accounts had not been produced and delivered, the Respondent has had the opportunity to make its view known to the Claimant much earlier than in March 2005.

If it would be held that delivery of Closing Accounts has any importance for the Claimant's claim against the Respondent in these arbitration proceedings, which the Claimant disputes, then the Claimant asserts, as has been stated above, that Closing Accounts have been delivered by Tiscali in due time and the figures and the information therein have been used by the Respondent to prepare its own September 2004 figures.

4.3.8 *The Respondent's knowledge about the accounting mistake*

According to the SPA, Article 9.3.1, the Buyer shall, in order to maintain the right to bring a claim against the Seller, within sixty days after "becoming aware of the claim" notify the Seller. The wording in the SPA describes a requirement for so-called "actual knowledge". The SPA, originally drafted

by the Respondent, does not contain any references to so-called "constructive knowledge", or requires the Buyer to make any specific investigations in order to becoming aware of any claims.

The Claimant became aware of the accounting mistake which constitutes breach of warranties in the end February 2005 and notified the Respondent about the claim arising out of the breach of warranties in a letter of 24 February 2005. Its claim against the Respondent is not time barred under the SPA.

According to the Transition Services Agreement, agreed between the Respondent and the Claimant, Tiscali Group handled the invoicing and billing system for Tiscali until February 2005, when billing data was sent to Tiscali for final invoicing of all customers under the previous regime. The Claimant was not in full control of Tiscali in October 2004. In accordance with the Parties' agreement, Tiscali's customer base was migrated to the Claimant during January and February 2005. When the billing report following this migration was received from Tiscali Group on 7 February 2005, the Claimant noticed a great divergence between the expected and the actual billing data. Due to this unexpected divergence, the Claimant undertook an investigation of all bookings and billings made during 2004, and discovered the systematical accounting mistake regarding accrued income in the books of Tiscali. It was at this point in time that the Claimant gained actual knowledge of the error. The Claimant was not and could not have been aware of the error prior to this point in time.

The SPA requires actual knowledge of a circumstance that could constitute a claim before the obligation to notify the claim is triggered. Accordingly, from this perspective it does not matter what the Claimant could or should have noticed earlier. In fact, the Respondent's first draft SPA provided that the purchaser "would be expected to have knowledge of" or "should have foreseen", but in the negotiations the Respondent accepted to delete this language and agreed to the concept of "actual knowledge".

Following a meeting between the Claimant and the Respondent in June 2005, where the Claimant's claim against the Respondent was discussed, the Respondent concluded that it needed its auditors to make investigations into the background of the Claimant's claim. The Respondent gave Deloitte an assignment to investigate. Accordingly, it was not a joint assignment, but an assignment given solely by the Respondent.

Deloitte have not "concluded that the result and/or EBITDA had not been overstated" or that "Spray had not incurred any costs or damages as a "direct consequence" of Tiscali's accounting mistake" or that the Claimant's claims were "misconceived". These statements are not statements by Deloitte but the Respondent's statements. The report also contains a number of limitations regarding the scope of the investigations and the reliance that

could be placed on the report. It is evident that Deloitte's assignment did not include any assessment of the effect on the warranties in the SPA of overstated revenues or costs. The only information included in Deloitte's report that is of relevance for the dispute is that Deloitte establishes that there were overstated revenues related to ADSL customers in the books of Tiscali per the end of September 2004.

The Claimant reviewed the figures and information included in the Closing Accounts in October 2004 and did not at that time discover the accounting mistake by Tiscali. The Claimant's auditor, KPMG, made an audit of the figures and information included in the Closing Accounts in October 2004 and did not discover the accounting mistake. The accounting mistake does not appear from the Closing Accounts. Deloitte, Tiscali's auditor, has reviewed Tiscali's books continuously during the Tiscali Group's ownership of Tiscali, and did not find the accounting mistake.

4.3.9 *The threshold amount stipulated in Article 9.2.1(ii) of the SPA*

The Claimant notes that the threshold of SEK 2,500,000 defined in Article 9.2.1(ii) of the SPA constitutes a threshold for exercising a warranty claim and not a deductible. The threshold shall be applied toward any gross amount of a warranty claim, and it will, therefore, apply also in a situation where, for instance, a counterclaim, raised by the Respondent and accepted by the Tribunal, results in net amount payable to the Claimant, which is less than the threshold amount.

4.4 Factual and legal circumstances invoked by the Respondent

The Respondent accepts that the Claimant's description of the circumstances leading up to the erroneous accrual presents a correct picture of the accounting oversight which has occurred. The Respondent also stipulates to the amount of the erroneous accrual as such.

The Claimant's warranty claim is denied for a number of reasons.

4.4.1 *Tiscali International's legal grounds for the defence*

Tiscali International admits that an amount of SEK 4,882,000 was erroneously reflected as revenue in the accounts for September 2004. However, Tiscali International disputes that this was the result of any "double invoicing" in April 2004 or later, or that it was caused by a "systematic default in the booking logic".

Further, Tiscali International disputes that any divergence in revenue noticed by Spray in February 2005 has been caused by accounting mistakes made on or before 30 September 2004.

Tiscali International disputes that there is a breach of representations or warranties by it under the SPA. An apparent mistake that can and should be rectified is not tantamount to non-compliance with GAAP. Since the mistakes involved revenue and cost of about the same size, the books and records and the accounts did in fact provide a true and fair view of the assets and liabilities and the profits, and, therefore, no basis for a warranty claim is present.

Tiscali International disputes that the erroneously reflected revenue has caused damage to or cost for Spray. In the event Spray has suffered damage or costs, Spray has failed to take reasonable steps to mitigate the loss as provided in Article 9.2.2 (iii) of the SPA. Such reasonable steps include reacting to ill-boding information from its auditors, e.g. in the form of the KPMG report received by Spray in October of 2004, and rectifying known accounting mistakes and removing any erroneous cost from the books and records of the Company.

Tiscali International notes Spray's view that "Closing Accounts" have been prepared and that such "Closing Accounts" have been delivered to Tiscali. However, Tiscali International disputes that Closing Accounts as per Article 5.1 of the SPA have been prepared, or that such Closing Accounts have been delivered to it as agreed. In any event, Closing Accounts, if the routinely compiled monthly report for September (C2) should qualify as such, have not been timely prepared and timely disclosed or delivered to Tiscali.

Tiscali International disputes that Spray is entitled to remedies under the SPA, since Spray has failed, at least in a timely fashion, to procure the agreed upon Closing Accounts, by which the erroneously reflected revenue would have been discovered along with other errors, and which would have caused the Parties to apply Article 5.2 of the SPA. Regardless hereof, since the 31 March Net Working Capital was SEK 16 million and the Closing Net Working Capital, as accepted by the Claimant, was about SEK 24 million, any deficit below SEK 8 million was and still is irrelevant for purposes of adjusting the purchase price for the shares of Tiscali, (cf. Articles 1.26 and 5.3 of the SPA).

Tiscali International disputes that the assignment to KPMG

> [---] to report on the closing balance sheet as of September 31, 2004 [---] [4]

has equalled the agreed preparation of Closing Accounts for the purpose of ascertaining the Closing Net Working Capital. Tiscali International has not received the KPMG report any sooner than on 12 October 2006, as an exhibit to Spray's submission C III, hence some two years after the fact. Under the

[4] Exhibit C 5, page 1, Introduction

mechanisms prescribed by Article 5.2 of the SPA, properly applied, there would have been no recourse for Spray in the current situation. Be that as it may, due to its non-compliance in this regard, Spray is precluded from basing a claim on facts that it would reasonably have detected, or in the alternative, Spray has filed the notice of its warranty claim too late. Its claim, brought in this arbitration, is for this reason time-barred.

Tiscali International disputes that the

> "accounting mistake was possible to detect only from a review also of the complete billing data."[5]

Tiscali International disputes that Spray has lacked the information or otherwise the means, by which the accounting mistake could and would have been detected, if proper Closing Accounts had been timely prepared as agreed. In fact, Tiscali asserts that Spray at the relevant time had sufficient information to warrant a deeper and more comprehensive analysis of the balance sheet of Tiscali.

Tiscali International disputes that Spray on matters relating to the size of the Closing Net Working Capital is entitled to other remedies under the SPA than those provided in Article 5.2. Erroneously booked revenue is typically a matter that relates to the size of the net working capital. The revenue in question is no exception. Tiscali International disputes that the SPA envisaged a right for Spray to elect to decide to disregard Article 5.2 at its discretion and instead rely on the representations and warranties for matters that typically and systematically relate to the size of the net working capital, particularly so in the situation where the purchase price would not have been adjusted under Article 5.3 of the SPA.

Tiscali International disputes that Spray, under the SPA, is entitled to (i) repayment of the purchase price or settlement of the Closing Net Working Capital equalling the difference between the 31 March Net Working Capital, on the one hand, and the Closing Net Working Capital, if lower, on the other hand; and (ii) in addition and irrespective hereof, an equally large indemnification based on the same facts and circumstances, since this would entail an unjustified double compensation for Spray.

Tiscali International disputes that "actual knowledge" [6] or lack thereof would excuse Spray from taking action to timely procure Closing Accounts or to respond to any information relating thereto. By the KPMG report received on or about 25 October 2004, Spray gained "actual knowledge" that "there are

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[5] C III, page 9 bottom
[6] Ibid., third paragraph

too many uncertainties"[7] relative to the balance sheet as of September 30, 2004.

Tiscali International asserts that cost and unrecognised revenue of at least the same size as the erroneously reflected revenue has been entered in the accounts for September 2004, and that such cost and unrecognised revenue have neutralised the effect of the erroneous revenue on the Closing Date. The cost in question is an ordinary operating cost of Tiscali.

Tiscali International disputes that a distinction should or could be made between cost for Skanova, on the one hand, and cost for Telenor or something else, on the other hand, as long as all cost constitutes operating cost. Tiscali International further disputes that an allocation towards Dial-up or ADSL of either revenue or cost is relevant for purposes of establishing the net working capital or the profit and loss for Tiscali.

Tiscali International disputes that the accounting mistakes need to be factually or otherwise connected or related to the erroneous accrual in the context of establishing the net working capital or a deficit.

Tiscali International is entitled to an apportionment of liability on account of the facts asserted, primarily the agreed mechanism of the determination of the Closing Net Working Capital, Spray's failure to properly respond to the information provided by KPMG in October 2004, its failure to share this information with Tiscali International, and its failure to procure Closing Accounts or to timely deliver Closing Accounts to Tiscali International, and Spray's failure to take reasonable steps to mitigate any loss, since a non-apportionment of liability would be inequitable.

4.4.2 *Factual cirumstances*

Initially, when the Claimant lodged a claim against the Respondent, the Respondent found the claims incomprehensible. In an effort to understand the Claimant's claim the Respondent agreed to a meeting with the Claimant on 28 June 2005. The meeting did not add to the Respondent's understanding. Instead, the Parties agreed that the auditing firm Deloitte would be contracted to investigate the Claimant's claim and its potential effect on the result and/or EBITDA, thereby facilitating a better understanding of the issues at hand and hopefully achieving a resolution of the matter. The Claimant provided Deloitte with all the facts and supporting documents for the claims.

In its report 9 September 2005, Deloitte concluded that the result and/or EBITDA had not been overstated for the period in question. In April 2004 there was an overstated direct cost for Telenor in the amount of SEK

[7] Exhibit C 5, Article 2 "Summary"

1,221,000, an overstated direct cost for Skanova in the amount of SEK 1,425,000, non-recognized revenues in the amount of SEK 164,000, and overstated revenue in the amount of SEK 2,894,000.

The actual effect on the income statement for April 2004 was a deficit in the amount of SEK 84,000. In September 2004 there was an overstated direct cost for Telenor in the amount of SEK 1,054,000, an overstated direct cost for Skanova in the amount of SEK 3,464,000, non-recognized revenue in the amount of SEK 419,000, and overstated revenue in the amount of SEK 4,882,000. The actual effect on the income statement for September 2004 was an excess amount of SEK 55,000

The conclusion of Deloitte's findings was that the Claimant had not incurred any costs or damage as a "direct consequence" of Tiscali's accounting mistake. Hence, the Claimant's claims are misconceived.

In March 2004 Tiscali changed its invoicing system and began to invoice its customers monthly in advance. At this time Tiscali had to rely on a temporary employee in the accounting department. She erroneously continued to apply the routines used in the past, i.e.; entering estimates of revenues and costs. The effect of this was that for shorter period revenue and costs were not correctly booked. However, as in the past, corrections were made the next month and any excess amounts were removed from the books. Hence, the error made for April 2004 was corrected in May 2004, made again for May 2005 and corrected in June 2004 and so on. This means that the error occurring in the records for September 2004 relate to that month but not to previous months. The excess revenue in the books for September 2004 amount to SEK 4,463,000.

4.4.3 *The Closing Accounts*

In the SPA, the Parties have agreed on certain Closing Accounts to be prepared by Tiscali no later than thirty days after the Closing Date. At the time when the Closing Accounts were due, Tiscali was thus in the ownership and full control of the Claimant. The Respondent hade no incentive to procure the Closing Accounts unless a claim had been timely raised. The Respondent also lacked access to the functions and facts needed in order to procure the Closing Accounts.

It is clear that the Claimant has had several versions of documents allegedly constituting the Closing Accounts. According to the Claimant, the Closing Account have been audited by KPMG in October 2004. Hence, the overstated revenue and the overstated costs, as disclosed by Deloitte, must have been detected. The Respondent maintains that, regardless if an audit was performed or the findings of such an audit, if the Claimant had prepared Closing Accounts according to the SPA, these errors would have been

detected. Any claim resulting would then have been dealt with according to Article 5.2 of the SPA.

The SPA in its final version reflects in all major aspects the demands from Spray, including the provision of an adjustment of the Purchase Price in case of a decrease in the Net Operating Capital as per the Closing Date. However, at that time the Closing Net Working Capital was approximately SEK eight million above the threshold Net Working Capital, i.e., the net working capital on which Spray based its offered purchase price.

Since the revenues and costs now debated are necessary elements in determining the Net Working Capital, and since the real difference is SEK 55,000, there is obviously no recourse under Article 5.2 of the SPA. Further, even assuming that the impact of the overstated costs could be discounted there would still be no recourse since the Net Working Capital as of September 2004 is some eight million SEK above the 31 March Net Working Capital, and the maximum amount of the overstated revenue is less.

By this it is clear that the Claimant's claim is nothing other than an attempt to circumvent the SPA and the agreed procedure for compensating the Claimant for a deficit in the Net Working Capital. The Claimant has not even complied with the provisions of the SPA relative to timely procuring the Closing Account, by which these facts would have been conclusively established and, as the case may be, settled.

By way of the Closing Accounts, the Closing Net Working Capital was to be determined. According to Article 5.3 of the SPA, if the Closing Net Working Capital was less than the 31 March 2004 Net Working Capital, the difference was to be paid to the Buyer as a reduction in the purchase price. The Seller and the Buyer were supposed to review the Closing Accounts and give notice to the other as to any disagreement and amount for each item, for which an adjustment was proposed. In case there was no agreement, an Accountants' Panel would finally decide.

This mechanism was agreed as the sole remedy against variations in the Net Working Capital, i.e., basically to determine the difference if any between the assets and debts on 31 March 2004 compared to 30 September 2004 and to establish the final purchase price.

The documents submitted by the Claimant do not meet the agreed definition in the SPA of Closing Accounts. The documents were delivered to the Respondent no sooner than on 29 March 2005. According to Article 5.1 of the SPA, the Closing Accounts should have been delivered to the Respondent "no later than thirty (30) Business Days after the Closing date", i.e. on 30 October 2004. Hence, the Claimant failed to produce the Closing Accounts as agreed, let alone delivered them within the agreed time limit

The Claimant owned Tiscali as of 30 September 2004. It is the Respondents position that the Claimant had sufficient control over and access to all functions and facts needed in order to produce the Closing Accounts.

By failing to produce the Closing Accounts as agreed, the Claimant has forfeited its right to base a claim on matters that would have been effectively dealt with, had the SPA been performed in this regard. It is now precluded from doing so.

By failing to produce the Closing Accounts as agreed, the Claimant has reneged on an undertaking that served the purpose of discovering exactly this kind of mistakes and discrepancies by scrutiny of all balance sheet items. If the Claimant had performed according to the SPA, the mistake and discrepancies would in all likelihood have been discovered, and the Claimant would have been in a position to timely file a notice under the SPA.

According to, Article 9.3.1 of the SPA, the Claimant is obliged to file A Notice of Claim within sixty days after becoming aware of the claim. If the Claimant had produced the Closing Accounts, as agreed, no later than on 30 October 2004, the notice period would have expired on 30 December 2004, i.e. thirty added to sixty days after the Closing Date of 30 September 2004. As an alternative to having forfeited its right to base a claim on the alleged facts or being precluded from doing so, the Claimant is not entitled to benefit from its failure to undertake the agreed investigative measures provided by the SPA, time wise or otherwise, and its Notice of Claim is thus filed to late.

As an exclusive remedy for the Claimant, in addition to the settlement of Net Working Capital, the Respondent has agreed to indemnify the Claimant with

> "...an amount corresponding to all costs or losses, deficits or expenses and reasonable legal fees ("Deficiency") of the Company ... arising out of any misrepresentation, breach of warranty or failure to perform a covenant or other breach of this Agreement." (SPA, Section 9.1)

By this follows, in particular by the word "deficit", that the Claimant has no claim since a deficit by necessity must take into account not only a negative variation, but also a corresponding positive variation, since a deficit in fact is

> "an excess of expenditure over revenue" (SPA, Section 9.1).

Since the Claimant has suffered no loss, and since there is no real deficit, the various allegations of breaches of warranties are without basis.

4.4.4 *The threshold amount stipulated in Article 9.2.1(ii) of the SPA*

A proper interpretation of Article 9.2.1(ii) means that it disqualifies any claim less than SEK 2,500,000 from forming the basis for a warranty claim.

It should be stressed, that the threshold amount applies to the net liability that may be payable to the Claimant on the basis of any warranty claim. Having regard to the fact that the Claimant has accepted as such the overstated cost for Skanova, this means that no amount to the benefit of the Claimant is allowable even if the Tribunal should accept the Claimant's warranty claim.

5 REASONS

5.1 Introduction

The Tribunal is satisfied that it has been properly constituted in conformity with the arbitration clause contained in the SPA and quoted in Article 2.1 above. As from the inception of the proceedings in this arbitration and throughout the duration all communications between the Parties and the Tribunal have been properly communicated. The Parties have been given opportunity to fully present their respective cases to the Tribunal.

Neither of the Parties has raised any objection in respect of the Tribunal's competence to adjudicate the dispute brought by the Claimant.

5.2 Common ground between the Parties

The Parties are in agreement that an amount of SEK 4,882,000 was erroneously reflected as revenue in the accounts for September 2004. The reason for this – as also agreed by the Parties – was that invoicing of ADSL services for April 2004 was made in the beginning of the period, while, at the same time, erroneously, an equivalent amount was booked as "accrued revenue" for the same monthly period.

The Respondent has disputed that the divergence in revenue noted by the Claimant in February 2005 resulted from an accounting mistake made before 30 September 2004, i.e. the Closing Date for the Tiscali Transaction.

The Tribunal finds that the erroneous entering of an amount of accrued revenue in April 2004 has been perpetuated on a recurrent basis each following month until it was discovered by Tiscali in February of 2005. The accounting mistake therefore persisted as of the Closing Date, i.e. on 30 September 2004.

The Respondent has further argued that a rectifiable mistake does not amount to non-compliance with GAAP and that the fact that mistakes concerned both revenue and cost of more or less the same size signifies that the books and records did provide "a true and fair view of the assets and liabilities".

The Tribunal finds that the fact that a mistake is rectifiable does not exclude its non-compliance with GAAP and that the matter whether the books and records of Tiscali – taken as a whole – conveyed a true and fair picture is not

sufficient to exclude a warranty claim as the double entry failed to convey a true and fair view of the assets and liabilities[8] in that particular respect.

The Tribunal also finds that whether the Claimant has been caused damage or cost is not a matter which will be an exclusive determinant; the claim which has been brought in this arbitration is not, strictly speaking, in the nature of damages but rather a contractual adjustment mechanism tailored to accommodate errors in, *inter alia*, the book-keeping records. The Tribunal will therefore be concerned with a review of what this mechanism required in terms of errors in the book-keeping records and in respect of the Parties' rights and obligations in relation hereto in view of the relevant contract provisions.

5.3 The erroneous accrual cannot constitute a breach of warranty?

On the Respondent's case, Article 5.1 of the SPA imposed a binding obligation on Spray to ensure that Closing Accounts were prepared according to principles exhibited in Exhibit 5.1 of the SPA. If the Claimant had complied with this obligation, it would have discovered the erroneous accrual prior to Closing, and the error could have been rectified without causing a reduction in revenue of sufficient importance to encroach upon the Closing Net Working Capital. The mere fact that the Claimant failed to discharge this obligation cannot, by any proper interpretation of the SPA, trigger a responsibility on the part of the Respondent to answer for any such error in the guise of warranty claim.

The Tribunal (which notes that the duty to prepare Closing Accounts according to Article 5.1 of the SPA is incumbent upon "the Company", i.e. Tiscali) notes that neither of the Parties has offered any elucidation of the reasons why the Closing Net Working Capital came to significantly exceed the 31 March Closing Accounts. Be that as it may, the purpose of determining the Closing Net Working Capital existed solely in the interest of the Claimant for purposes of providing a safeguard in the event where the Closing Net Working Capital would be found to be less than the 31 March Net Working Capital. There is nothing in the SPA which supports the assumption that the procedure described in the SPA to determine the Closing Net Working Capital was put in place to uncover possible errors in the book-keeping records. Failure by the Claimant to determine Closing Net Working Capital (or if the Claimant had done this, but failed to spot the erroneous accrual of revenue) would not, therefore, be susceptible of defeating a warranty claim by the Claimant.

[8] Article 6.5.3(a) of the SPA

5.4 Did the erroneous accrual exist as of the Closing Date?

The Respondent has further (correctly) noted that the invoicing and recordal of accrued revenue was a recurrent feature, which was reassessed and reinstated on a monthly basis. Therefore, the initial error in accrual which indisputably took place in April of 2004 was not the error, which existed at the relevant point in time – 30 September 2004 – in respect of which the relevant operations, the entering of billings in September of 2004 and accruals for the same period, were made in the beginning of October of 2004. Therefore, the Respondent's argument goes, the accrual error which the Claimant complains of, is one which the Claimant itself made after the Closing Date.

In the Tribunal's view, it is not so that the mere fact that the erroneous accrual was subject to a monthly recurrent assessment makes this accounting error – for purposes of the Respondent's warranty undertakings –constitute a new "error", and that this "error", for the mere fact that it may not have been physically entered into the books until shortly after 30 September 2004, will not constitute an erroneous accrual, which engages the Respondent's warranty undertaking. The fact that a periodic re-assessment of accrual entries by necessity has to be made in view of the interim character of this accounting item, does not detract from the relevance of the point in time when the erroneous accrual was first established, provided no correction of this recurrent misapplication was made prior to the Closing Date. The erroneous handling of this item has been established during the Respondent's ownership of Tiscali, and it cannot be absolved from this systemic misapplication of its revenue accounting because Spray has – after the Closing Date – continued to deal with this book-keeping item on an identical basis.

5.5 Purchase price adjustments and warranty claims

Article 3.1 of the SPA stipulates a purchase price of SEK 120,000,000. The provision foresees an adjustment of this purchase price in *one* instance, and that is in the event where the Net Working Capital (as defined in the SPA) per Closing (which is not indicated in the SPA but, which the Parties agree, took place on 30 September 2004) is less than the 31 March 2004 Net Working Capital.

Article 6 of the SPA contains an extensive catalogue of representations and warranties of the Seller. In Article 9.1, "the sole and exclusive remedy" for warranty claims is provided for, in the following terms:

> **9.1 Indemnification**
> Subject to Section 9.2 below, in the event of a breach of any of the Warranties by the Seller, the Buyer shall as the sole and exclusive remedy be entitled to an amount corresponding to all costs or losses, deficits or expenses and reasonable legal fees

("Deficiency") of the Company, the Affiliates or the Buyer, arising out of any misrepresentation, breach of warranty or failure to perform a covenant or other breach of this Agreement.

The Tribunal notes that the Parties are in agreement that the Closing Net Working Capital was essentially higher than the one entered in the "03 Accounts". As the Parties also agree, the purchase price of SEK 120,000,000, therefore, is final.

It therefore remains to be seen whether the Claimant, under the circumstances, will be entitled to indemnification because of the erroneous accrual of revenue accounted for above.

The Respondent represents the view that if the closing accounts had been delivered (by Tiscali to the Parties) as provided in Article 5.1 of the SPA, the Claimant would have discovered the error. As the Claimant failed to prepare Closing Accounts, it has remained oblivious to the accounting error until in February 2005. The Claimant's claim is therefore time-barred, as Article 9.3.1(i) of the SPA provides that "within 60 days after the Buyer becoming aware of the claim notify the Seller of the claims". On the Respondent's case, therefore, the language of Article 9.3.1 of the SPA, attaching significance to the point in time where the Claimant "becomes aware of any claim for which the Seller may be liable", means that the time period should count from the time, at which a normally diligent commercial person would have noted the error.

The Claimant has disagreed with this interpretation and stressed that the time period runs from "actual knowledge". In support hereof, the Claimant has invoked a prior draft of the SPA, where, in respect of breach of warranties, the limitation period started to run from the point in time when the Buyer "would be expected to have knowledge of" or "did foresee or should have foreseen" the breach (Article 8.6.1). This language was replaced by the straightforward "in case the Buyer becomes aware of any claims in the final SPA". Further, the Claimant has posited that it would not have been possible to discover the erroneous entry of accrued revenue on the basis of the Closing Accounts as this would require a collation of underlying data. This was not possible until February of 2005 when the complete billing data – as part of the agreed migration process – were integrated into Spray's computer system.

The Tribunal finds that the straightforward reading of Article 9.3.1 supports the Claimant's position, as Article 9.3.1 of the SPA counts the period of preclusion from the point in time when the Claimant "becomes aware of any claim".

In her testimony, Ms Åsa Edebert has accounted for how the erroneous accrual was discovered: After a final billing in the beginning of February

2005, Tiscali's parent company in Italy transferred the entire customer base and billing data for integration into Spray's computer system. It was then noted that the aggregate value of the billings, which was expected at SEK 20 million, amounted to some 13 million only. It was, therefore, realized by Ms Edebert that there was some error in the book-keeping accounts. In view hereof, an examination was started, which uncovered the erroneous accrual of revenue.

The Tribunal does not need to consider whether excessive tardiness on the Claimant's side to locate and identify the error could bring about another situation; this would be dealt with in Article 9.2.1(iv), giving 30 June 2006 as the ultimate deadline for warranty claims. The Claimant's contention that the error could not be discovered on the basis of the Closing Accounts alone, but required a review of the underlying billing records, rendered difficult with the migration process, appears plausible to the Tribunal. Therefore, the Claimant has been sufficiently vigilant to eliminate any discussion on tardiness.

The Respondent has further argued that from the fact that the closing Net Working Capital (as defined in the SPA) was significantly in excess of SEK 16,000,000, it follows that "any deficit below SEK 8,000,000 was and still is irrelevant for purposes of adjusting the purchase price".

The Tribunal finds no support for this proposition in the language of the SPA. It is conceivable that a share purchase agreement of this nature could have included language to the effect that warranty claims to the extent that the Closing Net Working Capital exceeded the March Net Working Capital would not entitle to indemnification[9]. However, no such mechanism is available under the terms of the SPA.

The Respondent has further argued that "[e]rroneously booked revenue is typically a matter that relates to the size of the Net Working Capital" and that this would imply that no indemnification would be called for. It is certainly correct that erroneously booked revenue does impact on the amount indicated as "Net Working Capital". However, this is irrelevant for the question whether representations and warranties of the Seller give rise to indemnification in the event of, for instance, erroneously booked revenue. Further, it is not so, in the view of the Tribunal, that the Claimant may not "elect to decide to disregard Article 5.2.1 in its discretion and instead rely on the representations and warranties" of the SPA[10]. It is simply so that the matter of determining the purchase sum according to Article 5.2 and the entitlement to indemnification in respect of warranties are separate and disconnected matters. The procedure prescribed in the SPA for purposes of

[9] The fact that these amounts might be subject to different tax treatment obviously does not need to be addressed here.
[10] Item 16 p. 4 of RVI.

determining the Closing Net Capital, was not, in the opinion of the Tribunal, put in place in order to uncover errors in the book-keeping materials, but had as its purpose the verification that the Net Operating Capital would not go below the level that was established as per 31 March 2004 as a result of Tiscali's business operations.

5.6 No double compensation

The Respondent has further argued that the Claimant is not entitled to an adjustment of the purchase sum and should therefore not be entitled to compensation under the warranties based on the same facts and circumstances "since this would entail an unjustified double compensation for [the Claimant]".

The Tribunal agrees insofar as it appreciates that – from the point of view of the Respondent – it may have to pay indemnification in a situation where in fact the Net Working Capital of the Company significantly exceeded that on which the transaction was based and where, additionally, the accounting records include cost items without factual basis (or overseen revenue items), which correspond at least to the erroneously entered revenue accrual.

However, this is what the SPA says.

The matter of the Closing Net Working Capital (as defined in the SPA) is relevant *only* for the agreed purchase sum and *only* in the event where this amount would turn out to be less than the 31 March Net Working Capital. The last-mentioned condition has not been fulfilled, and the purchase sum as agreed in Article 3.1 is therefore, as already stated, final.

The Tribunal notes that the duty to prepare Closing Accounts rests with Tiscali (which is not a party to the SPA) and that there is no duty for the Claimant to carry out the dispute resolution process for determining closing Net Working Capital provided in Article 5.2 of the SPA. Failure to procure Closing Accounts cannot, therefore, affect the timeliness or the justification of the Claimant's warranty claim.

5.7 Neutralizing the effect of erroneously reflected venue

The Respondent has further argued that erroneously entered cost and unrecognized revenue have neutralized the effect of the erroneous revenue. In further elucidation of this issue the Respondent has emphasized that all these revenue and cost items constitute ordinary operating cost and revenue of Tiscali and that for this reason they must be taken into account "for purposes of establishing the Net Working Capital and/or the profit and loss for the Company"[11].

[11] RVI, p. 5.

The Claimant has asserted that the error constitutes:

> [---] a violation against the following warranties in the SPA: Section 6.2 (Warranty in respect of Books and Records), Section 6.5 (Warranty in respect of the Accounts), in particular Sections 6.5.1, 6.5.3(a),(b),(c),(e) and (i), 6.5.4, 6.5.6 and 6.5.8, and Section 6.20 (Warranty in respect of Information).[12]

It is clear that the erroneous accrual cannot constitute a departure from the "03 Accounts" (as defined in the SPA), as it did not arise until in April 2004. Neither can it constitute a breach in respect of "the Accounts" which, as per definition, relates to balance sheets of the Company for the financial years 2000-2002. However, as regards the half year accounts for 2004 – Article 6.5.4 of the SPA – the posting of an accrual item for already invoiced receivables does not comply with GAAP. The question is whether this oversight may be neutralized by other oversights implying an improved cost/revenue situation for Tiscali. One may possibly argue that the accounts give a true and fair view of the assets and liabilities of Tiscali (overall) and of their profits and cash flow (a) and that they properly reflect the financial position of Tiscali (c).

However, the fact remains that the erroneous accrual does not comply with GAAP and that therefore a breach of a warranty is present. In such case, pursuant to Article 9.1 "the Buyer shall as the sole and exclusive remedy be entitled to an amount corresponding to all costs or losses, deficits or expenses and reasonable legal fees ("deficiency") of the Company."

The SPA does not entitle the Seller to compensation in any form for deviations from GAAP or otherwise, which convey an improved picture of the financial position of the Company. In the hypothetical situation where there were only such positive deviations, no compensation would be due to the Seller. By the same token, "neutralization" is not possible, because there is also a negative deviation from the accounts, the correctness of which have been guaranteed by the Seller. The SPA does not provide that positive deviations may be set off against negative deviations.

5.8 Apportionment of liability

The Respondent has finally contended that, in view of a number of alleged omissions on the part of the Claimant[13], and, in particular, its failure "to take reasonable steps to mitigate any loss", this should lead to a reduction of any duty to compensate "since a non-apportionment of liability would be inequitable".

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[12] The Claimant's Request for Arbitration, item 00

[13] The Respondent's submission RVI, Article 22.

The Tribunal may have some sympathy, at first sight, for the Respondent's view that the overall economic implications of how the asymmetric purchase sum adjustment mechanism has been structured in conjunction with the erroneous postings of specific cost and revenue items with opposing financial implications would make an "apportionment" called for. In the same direction may speak the fact that the operations of Tiscali, as appears to be undisputed between the Parties, had been loss-making from its very start, that the purchase sum, therefore, was not an expression of any multiplier of profits, but to a decisive extent determined by considerations of market share, implying that deviations of the relevant nature – had they been known at the time of negotiations – may not have influenced on the agreed purchase sum to any noticeable extent.

However, and in any event, in the face of the clear and unambiguous contractual language contained in the SPA, the Tribunal has no choice but to apply its provisions according to their clear import. Under the terms of the SPA, any duplication of the economic effect of the provisions on the purchase sum and departures from warranted entries or their putative influence on the purchase sum – had they been known at the time of SPA signing – is not given contractual relevance.

In a submission of 15 November 2006, Tiscali International as a further defense invoked Article 9.2.1(ii) of the SPA, providing that

> "the Seller shall have no liability unless the aggregate amount of all Deficiencies exceeds the sum of SEK 2,5 million [---] "

In view of this threshold, Tiscali International has noted that the difference between the claim which Spray pursues in this arbitration – SEK 4,882,000 (excluding legal costs as excepted in Article 9.1, last sentence, of the SPA) – and the overstated cost for Skanova of SEK 3,464,000, as stipulated by Spray, per 30 September 2004 is less than SEK 2,500,000. From this follows that no warranty claim is payable in any event.

Spray has disputed the interpretation advanced by the Respondent, arguing that the sum of SEK 2,500,000 is a threshold amount and not deductible for any warranty claim, and as soon as it has been exceeded, the whole amount will be payable as per the language of the invoked contract provision.

As a consequence of the Tribunal's conclusion that the Respondent cannot avail itself of "positive deviations" as a defense against a warranty claim raised by the Claimant, the Tribunal need not opine on whether the Respondent's interpretation of this particular provision of the SPA shall prevail. Suffice it to say, that the Claimant's warranty claim exceeds the sum of SEK 2,500,000 and that it is provided in the SPA for such an event that "the whole amount shall be payable".

5.9 Reasonable legal fees

According to Article 9.1 of the SPA concerning indemnification compensation in the event of any breach of warranty shall also include "reasonable legal fees". In respect of the amount which has been claimed with reference to this provision, SEK 50,000, the witness Ms Åsa Edebert has testified that Spray in fact incurred legal fees in excess of this amount in the context of examination of the accounting mistake. The Respondent has not specifically pointed to any circumstances which might invalidate this statement. The Tribunal concludes, therefore, that the Claimant shall be entitled to SEK 50,000 with respect to legal fees incurred for investigating the warranty claim.

5.10 Interest

The Claimant has requested interest from 27 March 2005[14], while the Respondent has stipulated interest from the date of receipt of request for arbitration for 26 January 2006.

The Claimant's position is evidently based on the principle expressed in Article 6 of the Swedish Interest Act, according to which interest on damages will accrue 30 (thirty) days after the aggrieved party has furnished its counterparty with sufficient information as to the claim.

The Tribunal notes that the warranty claim is contractual in nature, but that this Article still finds application. The Tribunal considers that the Claimant's notice of its warranty claim (C4) includes an adequate count for the legal and factual bases for its warranty claim to satisfy the requirements to trigger accrual of interest 30 days after the Respondent's receipt of the Claimant's notification. The Tribunal, therefore, believes that interest shall start to run from 27 March 2005.

The Tribunal notes for the record that the Claimant has requested interest on its costs for legal representation.

5.11 Costs

Both Parties have submitted bills of costs. The Claimant's request for relief having been successful, it follows that the Respondent shall be ordered to indemnify the Claimant for party costs accrued in the arbitration. Additionally, the Claimant shall be ultimately liable for arbitration costs, for which the Parties bear joint and several liability, as specified herein below, in their internal relationship.

In its bill of costs, the Claimant has requested reimbursement of costs for legal fees in an amount of SEK 985,416 and for disbursements in an amount

[14] The Request for Arbitration III(1)

of SEK 9 374. In a letter of 8 December 2006, the Respondent has stipulated to an amount of SEK 650,000 as reasonable costs for legal fees, noting, *inter alia*, that this corresponds to the level of fees accrued in the legal representation of Tiscali International.

The Tribunal does not see any reason to reduce the Claimant's request for costs for the reasons invoked by the Respondent or otherwise. The Respondent shall, therefore, be ordered to reimburse costs in the amounts specified by the Claimant.

On the basis of the foregoing, the Tribunal renders the following

AWARD

1. Tiscali International B.V. is ordered to pay to Spray Network AB an amount of SEK 4,932,000 (four million nine hundred thirty-two thousand) together with interest on this amount, pursuant to Articles 4 and 6 of the Swedish Interest Act (1975:635), from 27 March 2005 until full payment is effected

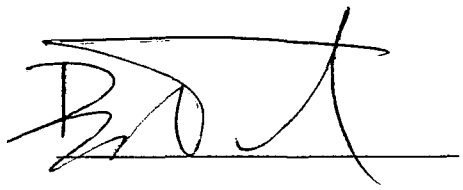
2. The Tribunal records that the fees and costs of the arbitrators are the following.

	Fee (excl VAT)	*VAT*
Mr Christer Söderlund	EUR 20,036	5,009
Mr Björn Tude	EUR 12,022	3,005
Mr Lars Boman	EUR 12,022	3,005
Costs and disbursements Mr Christer Söderlund	SEK 12,000	3,000
Fees and charges of the SCC Institute	EUR 8,768	2,192

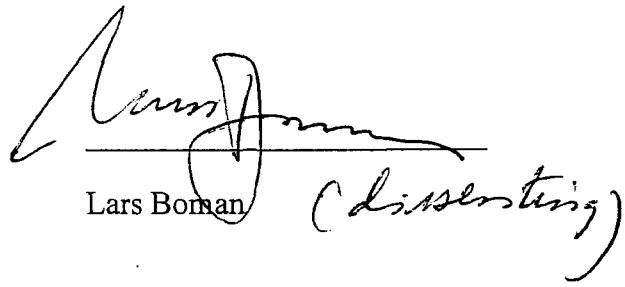
3. Tiscali International BV is ordered to pay to Spray Network AB an amount of SEK 994,790, constituting reimbursement of legal fees and disbursements, together with interest pursuant to Article 6 of the Swedish Interest Act on this amount from 28 December 2006 until full payment is made.

4. The Tribunal declares that Tiscali International BV shall be solely liable, as concerns the relationship between the Parties, for the Tribunal's fees, costs and disbursements, as well as the fees and charges of the SCC Institute, according to Item 2 above. To the extent that this liability entails a net payment obligation of Tiscali International BV according to the settlement of accounts to be effected by the SCC Institute, such payment obligation shall attract interest, pursuant to Article 6 of the Swedish Interest Act, from 28 December 2006 until full payment is made.

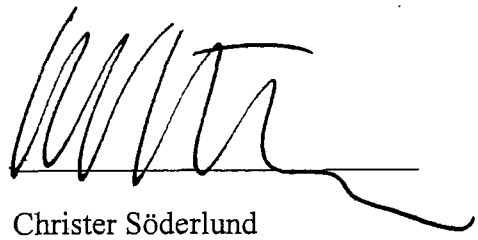
Stockholm, 28 December 2006



Björn Tude



Lars Bomman (dissenting)



Christer Söderlund

In the matter of an arbitration

between

Spray Network AB (Sweden), Claimant

and

Tiscali International B.V. (the Netherlands), Respondent.

Dissenting Opinion

Lars Boman

28 December 2006

I. Introduction

1.1 *General Background*

It is a well-known fact that it is hardly possible to determine an objective value of a company. There are both theoretical and practical methods designed to establish a value but, to a great extent, the final value normally depends on expectations and estimates of the performance and development of the company in the future.[1]

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[1] Neither of the Parties has referred to and relied upon any particular legal sources, such as statutory rules, precedents or legal literature. This may be due to the fact that both of them have found the outcome of this case wholly dependent upon the construction of some relevant clauses in the contract (the SPA) or the fact that Swedish law in the relevant respects is unclear, making references to potential sources of law not very safe. Be this as it may, for a wider discussion in respect of the problems commonly arising out of and in connection with an acquisition of all of the shares of a company and, in particular, an analysis in greater detail of the aspects of the value of a company, reference could be made to a number of well-known books, in particular by economists and from an economic/financial perspective. Although during the last 20 years we have seen a great number of M&A in Sweden, the Swedish academic literature on M&A is rather scarce, in particular, as regards the legal problems arising out of and around the calculation of the purchase price and its inter-relationship with warranties and indemnities agreed between the parties. Mentioning these general aspects concerning acquisition of companies only in passing, I limit myself to referring to some Swedish authors on the subject, e.g. Sevenius, "Företagsförvärv – en introduktion", 2003; Sevenius, "Due diligence eller garantier – en fråga om antingen eller", published in Balans No. 2, 2003; (Sven-Erik) Johansson/Hult, "Köpa och sälja företag", 2002; Orrbeck, "Företagsförvärv i praktiken", 2006. Reference could also be made to Karnell, "Om värdefel vid överlåtelse av rörelsedrivande aktiebolag", (published in "Festskrift till Knuth Rodhe", 1976, p 271) in respect of which some, if not all, of the views are still valid (and in which the author regrets the lack of relevant academic literature and precedent on the subject).

Some further guidance with regard to acquisitions of companies can be found in (Anders) Johansson, "Undersökningsplikt vid aktiebolagsförvärv", SvJT 1990 p 81 and in Hultmark (Ramberg) "Kontraktsbrott vid köp av aktie". Particular attention should be paid to an Award (blanked) published in the annual edition of the Arbitration Institute of the Stockholm Chamber of Commerce, 1986 p 47. There are also a number of small theses on the subject by law students, e.g. Jonsson/Liljegren "Parternas förpliktelser vid företagsförvärv" and Löfwall, "Kontraktsbrott vid aktieförvärv - särskilt om säljarens felansvar". (These books and theses contain references to a wider range of books.)

It can be concluded that there is still an almost total lack of precedent and legal writing in respect of the manner in which to deal in practice with breaches of warranties and how to apply remedies agreed between the parties, and whether such remedies are addressed with sufficient clarity by the parties. Even though certain practices have developed, sometimes attributed to practitioners/accountants involved in M&A transactions, this is not to say that these practices are always entirely correct or suitable in respect of a particular transaction or contract. However, reference should be made to two articles, one by Edlund in JT 1995/96 p 214 and the other by Leffler, in the same publication p 963, which deal with the matter of so called "positive divergences", contra remedies for breach of warranties under purchase of shares agreements (PSA) (and which take, partly, different positions). As will be apparent from my opinion to follow, I do not share, in all respects, the views presented by these authors and I am not sure that the purpose of Mr Edlund's article – to create clarity – has been quite successful. This is why I have taken the opportunity – and I think that the circumstances in the present Arbitration give a sufficient incentive to do so - to thoroughly analyse the transaction as a whole in order to be able to decide the issue of whether there is a deficiency relevant to the contract and, if so, to what extent there is a remedy available. And, in particular, as guidance to these parties and, perhaps, other parties, whether there are *defences* available to the seller, once a breach of warranty is established as a fact, such as the right to rely on other deficiencies in the presentation of the target company, which have, instead, a "positive" impact on its value or which would otherwise reduce or neutralise the effects of a breach of warranty.

Generally, it is difficult for a buyer to get a proper view of the performance and the financial status of the target company. Some factors are more important than others depending on the purpose of the purchase and the chosen purchase strategy. It is, therefore, normal for a buyer to request that the seller provide a number of warranties in respect of the status of the target company in various respects.

There is also, normally, an inter-relationship between the purchase amount and warranties provided and, one way or the other - and no matter what names have been given to various remedies applicable in case of breach of warranties - everything depends upon the question of whether the agreed purchase amount is/was "correct" or not under the circumstances.

Where Swedish law governs the contract, an issue which often arises is whether the Swedish Sale of Goods Act (1990:931) is applicable in certain respects, such as the true meaning and effects of warranties, which remedies are available, and to what extent the Act may have been contracted out.[2]

Another matter, which has attracted general interest, is the true meaning of a warranty as far as it stipulates that the books and accounts of the target company should comply with generally accepted accounting principles (GAAP). There is no reason to deal with these aspects in greater detail here, but it should be noted that it is not obvious that a breach of these principles would lead to a loss or deficiency capable of being indemnified in total, i.e. by its nominal value. The reason for this is that following these principles would not automatically lead to a determination, in all respects, of a correct value of the company, although they do form a tool designed to give the most accurate picture possible.[3]

1.2 *The effect of a breach of warranty on the purchase price and the role of indemnities agreed to in a contract as a remedy in case of breach*

As noted above, it may be very difficult to decide what effect a deficiency discovered under a warranty would have on a purchase price, particularly so if the price has been

[2] In the present case, the Sale of Goods Act has been expressly excluded from application as regards the remedies available in case of breach of warranties (Clause 9.1 of the SPA). This is not to say that to the extent that the contract is ambiguous or silent in certain respects as regards the remedy available, it would exclude the application of the Sale of Goods Act or general principles of contract law, but it would indicate that, e.g. the *prima facie* one-sidedness of the Act in the buyer's favour as to "positive divergences" has been contracted out.

[3] See the SCC annual edition, 1986, p 47 *et seq.*, where a substantial amount was deducted by the Tribunal from the nominal amount of the divergence.

calculated as the function of various prognosis parameters, such as multiples on Discounted Cash Flow or other elements found relevant by the buyers.[4]

I am not going to deal here with the complications generated by the use of multiples, but would mention that in particular in respect of companies which do not show a profit but in which substantial investments have been made to produce profit in the future, such prognoses are, of course, highly speculative. However, this strikes both ways, i.e. the seller will benefit from a speculative prognosis relied on by the buyer, for which the buyer takes the risk, but will instead normally have to give a number of warranties to form the platform for the buyer's risk taking.

1.3 *Changes between the Signing Date and the Closing Date*

It is normal for time to elapse between the date of the agreement to sell/ buy the target company and the execution of the agreement, i.e. between the "signing date" and the "closing date" and the circumstances may have changed during that period of time. Not least this may be relevant in respect of the Net Working Capital (NWC) since it could undergo fluctuations rather quickly. This may create a need for the buyer to provide additional capital immediately after closing in order to restore the NWC and such fluctuations may give rise to an agreement on adjustment of the purchase price.

It is obvious that whatever model has been used for deciding the purchase price (except maybe for the value of "material assets"[5]) it may be very difficult to establish the true effects of a change - during a relatively short period of time - in the circumstances, upon the basis of which the price has been decided, in particular, in case of a company which does not show a profit but where the initial investments have been very heavy. Nevertheless, it is common that a particular price adjustment scheme is entered into in respect of such changes, often with the purpose of protecting the buyer, but sometimes also to entitle the seller to an additional purchase price.

1.4 *Warranties and indemnities*

It is normal for the seller to provide warranties in respect of the annual and interim reports presented to the buyer which form a part of the material upon which the Buyer has decided to buy the target company and upon which his calculation of a purchase price may have been based, at least partly. In case of breach of a warranty, e.g. for the correctness of books and financial reports, the buyer would then normally be entitled

[4] Where the EBITDA (Earnings Before Interest, Depreciation and Amortisation) is normally the basic factor.

[5] "Substansvärdet"

to remedies. This follows, if not directly from the contract, in any event, from relevant sources of law, such as Sale of Goods acts or general principles of contract law and so is the case with regard to Swedish law. The remedy then normally applicable is the right to be compensated by an adjustment of the purchase price or other compensation for a proven loss.

As follows from the discussion above on the variety of steering factors, including expectations of the company's development in the future, it may be very difficult to define and quantify the loss suffered. The point of departure is that it is the buyer who has to prove his loss, i.e. in the first place, what would the purchase price have been, had the true facts been known. Sometimes it would not be very problematic, though, to assess the damage/loss suffered by the buyer, *inter alia*, if there are certain assets missing. The damage suffered will then normally be the cost of replacing the same asset. It may be far more difficult to assess the damage/loss in case of incorrect information regarding the revenues or costs on the books of the target company.

One way of avoiding the problem of actually determining the loss in the event of a breach of warranty is to agree on a certain amount of money to be paid in respect of given breaches of warranties, normally referred to as *"indemnities"*, which may become predetermined amounts, i.e. a kind of *liquidated damages*, applicable whether they reflect a cost or loss actually suffered or not. It is extremely important, though, if such indemnities are agreed upon to be the sole and exclusive remedy in case of breach of warranties, that the indemnity clause in the contract is abundantly clear in all respects in order not to give rise to disputes between the parties on the true interpretation of it and the underlying intent of the parties, etc.

An indemnity clause will usually serve two purposes. On one hand, it will assist the buyer in the sense that there will be *no need to prove the actual damage/loss* suffered by the breach of the warranty. The agreed amount will be payable whether the loss has been suffered at all and without regard to the actual quantum of it.

On the other hand, an agreed indemnity may work as a *limitation of liability* in favour of the seller (depending on the size of the indemnity agreed), since the seller would not risk having to compensate the buyer for a loss which may be the function of a multiple applied by the buyer when accepting a certain price level.

Therefore, depending on the circumstances in the individual case, the parties will benefit or suffer from the application of an agreed indemnity, but, on the whole, the use of indemnity clauses in Purchase of Shares Agreements (PSA) serve a reasonable purpose of leading to the conclusion of the contract more quickly and facilitating the

resolution of disputes, should such disputes occur in spite of the buyer having performed his due diligence and the seller having granted a number of warranties (believing they were correct, one may assume).

Other kinds of limitation of the Seller's liability under a warranty normally agreed to in acquisition contracts include a *ceiling* on the Seller's total liability and, often, the opposite, i.e. a *deductible* (threshold or a basket). Sometimes, there is also a clause which sets a maximum free value for each individual loss (*de minimis*) which, however, might cause problems when applied together with a deductible.

An indemnity clause, which clearly sets out the liquidated damages to be paid in case of a breach of warranty, would normally not cause any problems in that respect. However, if the clause refers, e.g. to the *loss* suffered, the circumstances may have to be considered further, including, *inter alia*, whether the seller, by virtue of the indemnity clause, is entitled to or has waived the right to invoke not only counterclaims under the PSA but also other defences available, such as relying on other divergences found to be in the seller's favour and which may reduce or neutralise a claim by the buyer under an indemnity clause.[6]

2. The present case

2.1 *Definitions*

In order to avoid any doubt, it should be noted that according to the definitions set out in the PSA the "Accounting date" means 31 December 2003; "03 accounts" means the Audited balance sheet . . . as per the Accounting Date"; "Accounts" means Audited balance sheet and the Audited profit and loss statement for the financial years 2000, 2001 and 2002; "Closing Accounts" means the consolidated balance sheet and profit and loss statements; "Closing Net Working Capital" means the total current assets less the total current liabilities of the company as of the Closing Date calculated in accordance with Exhibit 5; the "31 March Net Working Capital" means the current assets less the total current liabilities as of 31 March 2004, being SEK 16 million calculated in accordance with Exhibit 5.1; and the purchase price SEK 120 million decreased by an amount equal to a negative divergence between the 31 March and the Closing Net Working Capital established and paid in accordance with Section 5 of the PS

[6] This would, in my view, apply under Swedish law, at least, if the Sale of Goods Act has been contracted out in respect of the remedies available to the buyer.

2.2 *The Seller's Representations and Warranties*

Tiscali International has made a number of representations and granted warranties to the effect not only that Tiscali's Books and Records have in all respects been consistently, properly and accurately maintained in accordance with the relevant legal requirements and Accounting Principles (Clause 6.2), but also, and separately, that the half-yearly accounts for 2004 give a true and fair view of the assets and liabilities of the Company and of its profits and cash flow for the financial interim period ending on 30 June 2004, that these accounts comply with the GAAP applicable to a Swedish company, and that they properly reflect the position of the company as of such date.

2.3 *The agreed value of the company*

The finally agreed Purchase Price was MSEK 120 but, if applicable, decreased by an amount equal to a negative divergence between the 31 March Net Working Capital and the Closing Net Working Capital.[7]

It appears from the LYCOS Warranty Claim document dated 20 June 2005 (Exhibit R1 in this arbitration) that different approaches were used and combined for Spray's determination of the value of the target company. Among other things, this Claim states that the determination was heavily dependent on the perceived quality of the company and confidence in the management team, i.e. trust (p 11), and that these factors would have been significantly negatively impacted had the defaults at issue in this Arbitration been disclosed.

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[7] To judge from a previous draft provided by Tiscali International in the arbitration (albeit in no respect forming an integral part of the final contract), there was previously a different draft mechanism for deciding the purchase price, i.e. basically a fixed amount but increased by the Closing Net Working Capital. The draft also contained detailed rules on how to establish the Closing Net Working Capital in accordance with the Closing Accounts and what to do in case the parties were not able to agree on its calculation. Furthermore, should the Closing Net Working Capital exceed the Preliminary Closing Net Working Capital by more than SEK 500,000, Spray was obliged to pay the difference as an additional purchase amount.

In 5.3.2 of the draft it was expressly agreed that the *Buyer* was not entitled to set off or make any counterclaims due to other relations under this agreement or otherwise when paying any amount under this clause. Following negotiations between the parties this mechanism for establishing the final price was obviously partly abandoned and replaced by 3.1 and 5.3 in the PSA, the Closing Net Working Capital now being the main steering factor for the establishing of the final price. The rule by which the Buyer refrained from offsets or counterclaims based on other relations under the draft agreement was deleted.

The total deductible was changed from SEK 500,000 to MSEK 2,5.

Furthermore, LYCOS states, in support of the warranty claim, (having also referred at page 12 to there being a divergence as early as 31 December 2003, which was later partly corrected) that the valuation of the target company was primarily based on a multiple of the expected 2004 EBITDA.

Having concluded that the 2004 EBITDA estimate was at least MSEK 3 too high, this would, LYCOS says, by using the same multiple, have led to a reduction in the potential price by MSEK 25 in addition to the amount of the overstated revenue as such, and resulting in a total loss for Spray in the amount of MSEK 30. And, it is this amount which was then claimed against Tiscali International.

Notwithstanding the loss calculation by LYCOS, Spray has limited its claim in the arbitration to an amount corresponding to the overstated (double booked) revenue but later, following certain remarks made by Tiscali International, reduced its claim to MSEK 4,932, including the investigation fee of SEK 50,000.

2.4 *The Closing Accounts and the Closing Net Working Capital*

The Parties are not in agreement on whether proper Closing Accounts were actually delivered or not but it is common ground that neither the deficiency at issue here by way of Spray's claim nor other divergences or irregularities, whether to the benefit of the Buyer or Seller, were detected upon review of Tiscali's books as at the Closing Date.

Furthermore, it is common ground that the Closing Net Working Capital was in excess of the 31 March Net Working Capital by as much as MSEK 8 (i.e. an increase of 33 per cent in Spray's favour).

Following the price mechanism agreed to between the Parties, Tiscali International is not entitled, in spite of this substantial increase in the Net Working Capital, to any increase in the *purchase price*.[8]

[8] Notwithstanding the fact that if applying the multiple referred to by LYCOS (the arithmetical multiple based on the Net Working Capital alone being 7.5), Spray's potential price might have been increased by as much as MSEK 60. However, as is also evident from the LYCOS paper, the potential value of the target company was based on several other factors and circumstances even if the acceptable level of the purchase were *expressed* in terms of an EBITDA based multiple. Generally, the primary factor for a buyer when determining, within the scope of his acquisition strategy, the value of a company such as Tiscali, is the number of present customers and future development in this respect. Another factor is probably the benefits arising out of an increase in market shares.

2.5 *The Warranties relied upon by Spray*

Spray has relied upon a number of clauses (and sub-clauses) in the PSA, some of which, in my view, are not formally (as defined in the PSA; see above) relevant to its claim.

However, suffice it to say that the revenue booking mistake caused by an extra employee during the spring of 2004 (and whether this amounts, *per se*, to a breach of accounting principles in respect of this period) undoubtedly did cause the financial statements in Tiscali's books to be incorrect and, therefore, in principle, is capable of serving as the basis for an indemnity claim of breach of warranty pursuant to the SPA.

2.6 *The Indemnification clause*

According to the Indemnification clause (Clause 9) of the SPA, the Buyer shall, in the event of breach of the warranties provided by the Seller

"...as the sole and exclusive remedy be entitled to an amount corresponding to all costs or losses, deficits or expenses and reasonable legal fees ("Deficiency") of the Company) . . . arising out of any . . . breach of warranty . . . or other breach of this Agreement."

It is further stated that no remedy under the Swedish Sale of Goods Act would be available to the Buyer.

Spray's claim has been based on this Indemnification clause to the effect that Spray is entitled to an amount corresponding to costs or losses, deficits or expenses, arising out of the breach of warranty at issue in this arbitration. Spray has claimed that its right to indemnity is separate from and independent of any other terms of the SPA.

The question remains, however, what is covered by the words quoted above and there are a number of other issues to consider before reaching a conclusion as to the merits of the indemnity claim as such. However, for logical reasons, I shall first deal with the matter whether Spray's claim is time-barred under the SPA, as claimed by Tiscali International.

2.7 *Is Spray's claim time-barred?*

Although "the Company", i.e. Tiscali, may not have provided, timely, proper or full Closing Accounts, a task which had been given to it jointly by Tiscali International and Spray[9], this does not mean that the limitation period agreed to between the Parties under the warranties and indemnities clauses did not start when Spray actually became aware of a breach of warranty.

Even if Spray, as the Buyer of Tiscali, was in control of Tiscali, and even if, taking into consideration that the accounting mistake relevant to this arbitration would most likely have been detected by a more thorough review of Tiscali's books as per the Closing Date, I share Spray's view that Tiscali International has not proved in this arbitration that Spray was aware of these divergences at a stage earlier than has been stated by the witnesses testifying in this respect. Therefore, Spray's claim is not time-barred.

Furthermore, it is Spray's view that if it was Tiscali International's position that the Closing Accounts had not been properly provided by the "Company" in a timely fashion, Tiscali should have given notice in this respect, first to Tiscali and, second, to Spray in order to protect any rights to time limitations Tiscali International may have under the SPA. Tiscali International did not do this and should now be deemed to have lost its right to rely on time limitations as presently argued by Tiscali International. I share this view.[10]

2.8 *Does the Indemnification clause exclude a right of Tiscali International to invoke and rely upon "positive divergences" in Tiscali's books in order to neutralise or reduce its liability under this clause?*

Tiscali International has claimed that, in any event, it is entitled to defend itself against an indemnity claim by Spray for breach of warranty by proving that there are other divergences in the books to its favour. Tiscali International has relied in this respect upon a Report by Deloitte (Exhibit 2) and testimony provided by Deloitte's (Tiscali's Accountant) Mr. Göran Engquist to the effect that these divergences neutralise or reduce the effects of the accounting mistake made in Tiscali's books in respect of the double booking of revenues.

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[9] In the previous draft referred to above, this was an obligation of Tiscali International, but the final agreement placed this task with the "Company".

[10] Some general guidance in this respect could be found in Hultmark (Ramberg) "Reklamation vid kontraktsbrott" p 47 *et seq.*, p 110, s 113, s 119, s 171 *et seq.* and particularly p 179 *et seq.*, NJA 1993 p 346, and comments by (Jan)Ramberg, "Köplagen" p 398, and the same author in JT 93/94 s 522 *et seq.* under the heading: "Köprättsliga reklamationsregler och konkurrerande rättsgrundsatser").

It is Spray's position that no such right exists, there being no agreement to this effect, and that, consequently, the Indemnification clause, exclusively governs breaches of warranty.

There is no doubt that the contract does not entitle Tiscali International to any *additional purchase amount* corresponding to any deficiency discovered in the books which would be in Tiscali International's favour, such as costs being booked at too high a value. The Indemnification clause does not deal with this matter at all. The question then arises whether this also means, although not dealt with expressly in the Indemnification clause which, according to its wording, is solely in favour of the Buyer, that the Seller has no right to rely upon such a defence in lack of any express wording to the contrary, even if faced with a breach of warranty claim. Or, would a defence always be available provided that "neutralising" deficiencies in the same books and records other than those relied upon by the Buyer could be proved?

It is well-known that a SPA commonly includes an indemnity clause which expressly states a seller's right to avail himself of other divergences in his favour - so called "positive divergences" - in case the buyer were to claim breach of warranty.[11] However, there is not always such a clause[12] and the question then arises as to whether this, *e contrario*, would mean that no such "counter remedy" would be available. I do not think so.

It is common ground that the present SPA does not include a "positive divergences" clause. On the other hand, the SPA does not include any words to the effect that the Seller is *not* entitled to rely upon divergences in his favour should he be faced with an indemnity claim. If it did, this would, of course, make it difficult for the Seller to invoke such an argument, at least if the positive effects were not related to any other price mechanism agreed in the contract. But in the absence of words to this effect, there are

[11] One dilemma, when such "positive divergences" clauses in the seller's favour are used by the parties, is that they are seldom sufficiently strict and precise. This is Edlund's concern in his article in JT 1995/96, in which he tries to limit the scope of a general clause of this kind by way of interpretation in order to avoid a situation where the seller tries to invoke all kinds of "positive divergences", including those which should be assumed to be falling under the seller's ordinary risk spectrum, i.e. circumstances or mistakes for which he would normally take the risk as a seller, whether intentionally or not. (The Rembrandt example relied upon by Spray's counsel in his concluding speech seems to be a variation of the Zorn example referred to by Edlund in his article.) Although I agree that it may serve the purposes of clarity and simplicity to interpret a "positive divergences" clause narrowly, thereby excluding a number of far-fetched "off sets", I think that these purposes should, preferably, be achieved by an express clause to the effect that the seller is either *not* allowed to rely on "positive divergences" as a defence, or may only rely on those particularly set out in the clause.

[12] In my experience, it is difficult for a buyer to achieve a clause to this effect, if the matter were to be expressly addressed during the purchase negotiations, unless it is made particularly clear that the clause also, and primarily, serves the purpose of limiting the liability of the seller, e.g. for multiple effects on the purchase price.

insufficient grounds, in my view, for a construction of the contract which would deprive the seller from defending himself by relying on deficiencies in his favour.[13] [14]

As indicated in footnote 1 above, I do not think that there are sufficient grounds to share the view of Edlund (JT 1995/96 p 214) as to what could be concluded to be the position under Swedish law in this respect. In particular, I have some doubts as to the reference to the Swedish Sale of Goods Act and Edlund's conclusion that the Act does not include any rule which would give rise to any right of the buyer to rely on "positive divergences". Although this may be right on the face of it, there are, nevertheless, certainly a number of situations where the seller would be entitled to counter defences.[15]

Therefore, on the contrary, the point of departure should, in my view, be that there is a right to reduce or discount a warranty claim (or to use the "positive divergences" for "off-set", if you like) as a means of defence, if not expressly contracted away.

Another question is whether the fact that an agreed indemnity clause fails to set out a predetermined amount or to provide a firm model for determining the liquidated damages, (which should be the very purpose of the indemnity clause), but actually forms a rather open model, e.g. that the Seller has to compensate the Buyer for the "loss"[16] suffered, should not be deemed to confirm that it is the proven *net loss* which should be compensated.

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[13] Reference is made to Karnell, page 273, which expressly refers to the fact that it is obvious that defences will be invoked by the seller as to any positive divergences in the books and records in the event the seller is faced with a warranty claim. Unfortunately, the author does not take this matter any further in his article.

[14] In some Swedish model clauses in use in the market, reference is made to, e.g. the "nominal" value of a breach of warranty or a "krona för krona" calculation, but this is insufficient if it does not precisely state that the seller is not entitled to rely on any counter defences in the form of "positive divergences", since they only deal with the matter of the amount, *per se*, of the indemnity and do not address the question as to whether the seller is entitled, once this amount has been determined, to any defences.

[15] For example, where a buyer claims lack of conformity because the seller delivered apples instead of pears. This is, of course, not to say that the buyer would be entitled to keep the apples without paying for them if the seller later, having been notified of the non-conformity, were to deliver pears instead, or that if the buyer claimed compensation for the missing pears, the value of the apples, if not redelivered, should not reduce the amount of the buyer's loss. And even if the buyer were entitled to a price reduction or to damages because of non-conformity, wouldn't the seller be entitled to claim that another part of the delivery was not in conformity with the contract, either, since the goods delivered were, by mistake, of a higher quality and should have a different price?

[16] From an accounting view, at least, the effect of overstated revenues would hardly be referred to as a "cost" but rather a "loss".

When first considering this, I did not share Tiscali International's view, *inter alia*, for the reason that the purpose of Clause 5.3 is not, at least not primarily, to create the possibility of correcting previous divergences, but to establish whether the company has undergone *changes* in the NWC between 31 March and the Closing Date (which might have been due to Seller's running of the company during this period) and since the determination of the final Purchase Price in 3.1 of the SPA is, undoubtedly, one-sided and includes both a potential upside for the buyer without any obligation to pay an additional purchase amount and a right to a reduction of the Purchase Price in case of a negative divergence. Such an agreement may then well have effects in other respects, foreseeable by the parties.

However, having given this further thought, I have come to the following conclusion and I give air to it here for the mere reason that it might attract some interest in the principle.

In a situation where there are no other defences available to the seller, such as "positive divergences" in the books of the target company, as in the present case, (apart from the agreed price mechanism as such) one effect of the price clause being one-sided could be that, even if the damage, *per se*, of a breach of warranty effecting the NMC would be "consumed" or covered by a corresponding *increase* (for other reasons) of the NWC, this would not be relevant because this would still be an effect of the one-sidedness of the price mechanism. However, in a situation where there is a *decrease* in the NWC and this is wholly or partly due to a breach of a warranty of the kind relevant in this arbitration (overstated revenues), I tend to agree with Tiscali International that this would mean that the seller has to pay twice for the same deficiency and I doubt that this is what the Parties intended. It is necessary to look at the contract as a whole[19], in my opinion, and had there been a need to decide this issue here, which it is not for the reasons set out above, I would probably have found for the seller.

Having said this, I agree, though, that had the Closing Accounts in the present case been sufficiently detailed and fully audited, which I appreciate they were probably not, the overstated revenues would most likely have been discovered and would, at that stage, not have led to any warranty claim. But this is not relevant, in my view.

[19] See for a corresponding view, Karnell, p 280

2.10 *Quantum of Tiscali International's defence against the indemnity claim*

Spray has accepted, *per se*, that costs in the amount of the MSEK 3,464 were incorrectly booked as being too high compared to the final actual costs in respect of the Skanova Contracts.

As regards the Telenor Contracts, Spray has not accepted the alleged incorrectness, *per se*, and the same is valid in respect of the amount of the SEK 419,000 allegedly being a preliminary invoicing charge of SEK 15 per invoice, which did not correspond to any final charge to Tiscali.

Spray has claimed that, in any event, the breach of warranty did not *cause any corresponding* overstated costs or that the overstated costs did not have any *connection* with the overstated revenue for which the claim for indemnity has been made.

In my opinion, there is nothing in the SPA - or under general principles of contract law for that matter - which would lead to the conclusion that the defence by the Seller against a warranty claim, if allowed, should be limited to divergences which are directly connected with the deficiency relied upon the Buyer.[20]

Furthermore, in the present case, the overstated costs are all costs for Tiscali's purchase from other sources of the programmes and services, which Tiscali, in turn, sold and distributed to its customers. Even if a connection were required, I am satisfied that there is such a connection, whether the costs were attributable to the same underlying contract or not, and whether they originally date back to a previous year or not, as far as affecting the relevant books and records is concerned.

2.11 *The deductible*

I now turn to deciding the matter of how to apply the deductible agreed in the SPA.

Spray has claimed that the steering factor should be the nominal loss once that loss has been established and that, since the deductible of MSEK 2.5 had been exceeded, Spray is entitled to be compensated without any deductible being applied.

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[20] As mentioned above, Edlund (JT 1995/96 p 216 *et seq.*) has tried to limit the scope of a "positive divergences" clause by way of interpreting the clause as such, but there is no real support for this, simply because the clause he refers to does not say so. It is a different matter that such an interpretation might serve a practical purpose and create a reasonable balance between the parties in the individual case, but it is too broad, in my view, to be applied generally and as an adopted principle. Leffler (JT 1995/96 p 963 *et seq.*) accepts "off sets" to a greater extent, but claims that the respective divergences should be at least "commensurable". However, as is apparent from the examples to which he refers, it is not easy to draw up the border-line here either.

I have concluded above that Tiscali International is not entitled to rely upon the "nominal" loss claimed to have been suffered by Spray, but that this amount should be reduced by the amounts being the result of other proven, positive, divergences in the books and records relied upon by Tiscali International. Therefore, I can see no reason why the relevant loss to be applied in respect of the deductible should be different. Consequently, the *net* loss should be applied and this falls below the agreed level of the deductible.

* * *

For these reasons Spray's claim should be dismissed.

3 Costs

Since I have found in favour of Tiscali International, it follows that Tiscali International should be awarded full costs in this arbitration and Spray be ordered, as between the Parties, to be liable for and ordered to pay the costs of this Tribunal and the SCC Institute. However, having been outvoted in respect of Spray's main claim, I agree with my colleagues in respect of interest and costs.