CHAPTER 5

The *Belgor* Case: Towards an Extensive Interpretation and Application of Arbitration Agreements

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§5.01 INTRODUCTION

The jurisdiction of an arbitral tribunal only covers issues that fall under the scope of the arbitration agreement. This reflects the consensual nature of the arbitral process. If an arbitration agreement does not cover a specific dispute, the arbitrators have no jurisdiction and a future arbitral award may be set aside or its enforcement may be refused. Therefore it is essential to properly ascertain the scope of an arbitration agreement.

There has long been a debate of whether arbitration agreements should be construed widely or narrowly. There can be no doubt that the current trend in international arbitration is to construe arbitration agreements extensively.[1] Although some jurisdictions apply slightly stricter requirements than would otherwise be the case with respect to the determination of whether an arbitration agreement has been entered into, once such an agreement has been established it is considered that there is no reason for interpreting it narrowly.[2] Favouring a wide interpretation of arbitration clauses avoids the risk of separate proceedings that deal with the same related issues and set of facts. The broad interpretation approach is also typically motivated by an assumption that it is the will of the parties to apply the arbitration agreement to any

1. Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2014), 1325 et seq. with extensive references and Redfern & Hunter, *Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press, 2015), 93 et seq.
2. Poudret & Besson, *Comparative Law of International Arbitration* (London: Sweet & Maxell, 2007), 265 et seq.

dispute arising from their commercial relationship. An extensive interpretation would thus correspond to an average and typical *hypothetical* mutual intention of reasonable commercial parties.[3]

Until recently, the international trend had not left its mark in Swedish arbitration law. In *I.H., L. Consulting AB and B.S. v. Kemisten AB and L.M.L.* (NJA 2017 p. 226), the Supreme Court held that:

> An extensive interpretation of an arbitration agreement risks causing a party to be denied the right to have his case tried in court, even though he or she never intended to waive this right. Furthermore, such an application is liable to increase the uncertainty as to what effects an arbitration agreement will have in the future and it may also conflict with the requirement in the Arbitration Act that disputes must concern an identified legal relationship.[4]

When determining the scope of an arbitration agreement under Swedish law, two separate but closely related issues arise.[5] The first is a contract interpretation issue, i.e., the scope shall be determined by interpreting the arbitration agreement. The second issue is a law interpretation issue. Parties cannot refer all their future disputes to arbitration regardless of the basis for such disputes or all disputes arising between the parties during a certain period. The scope of an arbitration agreement is limited by the mandatory requirement in section 1(1) of the Swedish Arbitration Act (SAA) (the Act) that disputes must concern an identified legal relationship (the *identification requirement*). Similar to the arbitrability requirement, the identification requirement is a

3. Born, *supra* n. 1, at 1325 et seq. *See also* e.g., the decision of the House of Lords, 17 Oct. 2007 (*Fiona Trust & Holding & Holding Corporation & Ors 20 v. Yuri Privalov & Ors* 17 sub nom *Premium Nafta Products Ltd. (20th defendant) & Ors v. Fili Shipping Co. Ltd. (14th claimant) & Ors* [2007] UKHL 40), paras 17–18: '*Ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. […]. As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed.*' and the decision of the Swiss Federal Supreme Court 4A_583/2017 of 1 May 2018, published on 6 Jun. 2018, paras 3.3 and 3.4 (authors' translation): '*The interpretation of an arbitration agreement follows the principles generally applicable to the interpretation of private declarations of intent. The decisive factor is primarily the agreement of the parties' actual will. If such an agreement cannot be determined, the arbitration agreement must be interpreted according to the principle of trust […] If it is clear that there is a valid arbitration agreement, there is no reason for a restrictive interpretation; rather, it can be assumed that the parties wanted the arbitral tribunal to have comprehensive jurisdiction. […] In this context, federal court practice assumes that the parties submit their dispute to the arbitral tribunal for assessment as a whole due to a lack of special circumstances and do not want to split it up in such a way that individual questions would have to be submitted to other courts for a decision*.'
4. NJA 2017 p. 226, para. 13. *See also infra* n. 43.
5. The issue of the scope of the arbitration agreement, both *ratione materiae* (i.e., what substantive aspects and disputes are covered by the agreement) and *ratione personae* (i.e., who the parties to the agreement are), is governed by the law applicable to the arbitration agreement. If the place of arbitration is in Sweden, Swedish law will govern the arbitration agreement, unless the parties have (explicitly) agreed otherwise (section 48 of the Act).

statutory validity requirement that restricts the parties' right to submit certain disputes to arbitration.[6] Many other national arbitration laws contain a similar requirement, thus recognizing the need for some degree of precision when parties define the kind of future disputes that they undertake to submit to arbitration. However, it appears that the requirement, in comparison, has had very limited practical importance in these legal systems and there are extremely few reported cases in which an arbitration agreement has been declared invalid for failure comply with this requirement.[7] Although this cannot be used as a pretext for the conclusion that the condition is of no effect, it clearly suggests a broad interpretation being required. The element is also found in the New York Convention.[8]

In what has been described as '*one of the most important arbitration law judgements for years*',[9] namely *Joint Stock Company Belgorkhimprom v. Koca Inaat Sanayi Ihracat Anonim irketi* (NJA 2019 p. 171, *Belgor*), the Swedish Supreme Court has provided a new precedent regarding the proper determination of the scope of an arbitration agreement, providing for a fairly liberal interpretation not only of the arbitration agreement as such but also of the statutory term 'legal relationship'. In this respect, the precedent brings Swedish arbitration law in line with international arbitration principles. This chapter will address and discuss the precedential value of the judgment and its implications from a practical perspective.

§5.02 THE *BELGOR* CASE

[A] Background

The case concerned an arbitral award rendered in a dispute between the Belarussian company Belgor and the Turkish company Koca. In 2011, the parties, as well as a third party,[10] had entered into an agreement under which Koca was to perform certain construction and excavation works in relation to two mining shafts in Turkmenistan

6. The arbitrability requirement, also laid down in section 1(1) of the Act, provides that it is only disputes concerning matters in respect of which the parties *may reach a settlement* that can be referred to one or several arbitrators for resolution under the Act. Disputes which are not amenable to out-of-court settlement are not arbitrable. This means that the limits of arbitrability coincide with the limits of the parties' freedom of contract.
7. Born, *supra* n. 1, at 294 et seq. with extensive references.
8. *See* further section §5.02[B], third bullet point *infra*.
9. Danielsson, *Swedish Arbitration-Related Case Law* in *Stockholm Arbitration Yearbook 2019* (The Netherlands: Kluwer Law International, 2019), 3. However, it should be admitted that this is only partly due to the innovating statements concerning the interpretation and application of arbitration agreements. The Supreme Court also established new precedents in two other respects. One relates to the established presumption that the decision of an arbitral tribunal to deny a request for extension of time should hold, unless the decision appears indefensible. Another precedent was set with respect to the threshold for establishing a procedural irregularity; the Supreme Court clarified that the effect of a procedural error '*should be of some reasonable importance to the challenging party in order to be eligible for challenge*'. These topics will not be discussed further. This article focuses solely on the part of the judgment that deals with the scope determination of arbitration agreements (paras 12–24).
10. The third party, Trust Shakhospectroy (referred to as the 'Executor' in the award), was responsible for technical support and supervision of the Construction Contract.

(the Construction Contract). The Construction Contract contained an arbitration agreement with the following wording:

> Any disputes, disagreements and claims between the Employer and the Contractor emerged because of or in connection with the present Contract or upon violation, termination or invalidity of the present Contract shall be finally settled by arbitration in accordance with the Arbitration Court of the Arbitration Institute of the Stockholm Chamber of Commerce.

Belgor terminated the Construction Contract with effect as of 29 November 2012. The purported reason was that Koca had produced defective works. Following Belgor's termination of the agreement, the parties established a working committee that entered into negotiations on how to determine the parties' respective remaining obligations. On 4 December 2012, in parallel with these negotiations, Belgor requested Koca to perform certain additional works on the shafts (hereinafter 'the Additional Works'). It was common ground between the parties that the Additional Works were performed on the basis of five separate contracts, which did not have arbitration clauses, but which instead stipulated that the parties had the right to refer disputes to the Economic Court in Minsk. The parties ultimately failed to reach a final solution on how to dismantle and terminate their contractual relationship. Against this background, Koca initiated arbitration proceedings and requested that Belgor should be ordered to pay almost USD 11 million for completed works, additional works, machinery and equipment plus interest. Koca further claimed compensation for lost profit in excess of USD 20 million. Belgor, who disputed Koca's requests, requested for its part that Koca should be ordered to pay almost USD 10 million as compensation for defects in the completed works. Moreover, Belgor disputed that the arbitral tribunal had jurisdiction to resolve Koca's claims concerning the Additional Works. According to Belgor, that part of the dispute did not fall under the scope of the arbitration agreement of the Construction Contract.

On 3 April 2015, the arbitral tribunal rendered its award. The tribunal, finding that it had jurisdiction to resolve the claims concerning the Additional Works, partially granted Koca's action against Belgor. The counterclaim submitted by Belgor was rejected in its entirety.

In deciding the issue of jurisdiction, the tribunal held that disputes concerning the Additional Works could not be said to '*arise out of*' the Construction Contract because the Construction Contract did not directly refer to those works.[11] However, in the view of the tribunal, the Additional Works were performed '*in connection with*' the Construction Contract, in particular, '*since the Additional Works were ordered and performed while the parties were still negotiating the consequences of the termination of the construction contract*'.[12] As for the contracts without arbitration clauses (the

11. *Joint Stock Company Belgorkhimprom v. Koca Inaat Sanayi Ihracat Anonim irketi*, SCC Case No. 2013/043, 3 Apr. 2015, para. 81 of the award.
12. *Ibid*., para. 83 of the award. It may be mentioned that as a matter of Swedish law making fine distinctions in wording between expressions such as 'in connection with', 'in relation to', 'under' and 'arising out of' is considered rather artificial, as commercial parties seldom have contemplated or intended any distinctions between such semantic linguistic differences.

jurisdiction agreement), the tribunal reasoned that they did not exclude jurisdiction for two reasons. First, the tribunal held that the jurisdiction agreement was optional, i.e., it provided the parties with a right but not an obligation to settle disputes in the designated forum. Second, according to the tribunal, it could reasonably be assumed that it had been the intention of the parties to settle all disputes between them in one and the same forum, and that the forum first chosen by them, i.e., arbitration as per the arbitration clause in the Construction Contract, best corresponded to their common intention.[13]

Belgor challenged the award before the Svea Court of Appeal and later the Supreme Court, requesting that the award ought to be wholly or partially set aside *inter alia* on the basis that the tribunal had decided issues not covered by a valid arbitration agreement between the parties.[14] Belgor maintained its position that the Additional Works were not covered by the arbitration agreement of the Construction Contract but instead fell within the scope of the jurisdiction agreement in the separate service agreements that referred to the Economic Court in Minsk. Belgor further contended that the service agreements were not addenda to the Construction Contract but covered other legal relationships than the Construction Contract. Therefore, according to Belgor, the tribunal had lacked jurisdiction over the claims with respect to the Additional Works. Koca's position was that the additional works fell within the scope of the arbitration clause of the Construction Contract.[15] Koca also submitted that as the jurisdiction agreement in the service agreements was optional, it did not exclude the arbitration clause in the Construction Contract.

[B] The Courts' Determinations

The Court of Appeal began its reasoning by holding that:

> If the challenging party asserts that there exists no valid arbitration agreement that covers the alleged legal relationship, it is for the respondent – Koca in the case at hand – to establish that such an agreement exists.

The Court of Appeal went on to state that as Koca had not presented any detailed account of what the relevant additional works involved or how they were related to the Construction Agreement, the Court of Appeal was not in a position to make a more general assessment of the connection between the Construction Agreement and the Additional Works. However, based on the available information, the court could

13. *Ibid*., para. 85 of the award.
14. *See* section 34, subsection 1, item 1 of the Act, which provides that an award shall be wholly or partially set aside upon the request of a party if it is not covered by a valid arbitration agreement.
15. It may be mentioned that Koca, in the alternative, before the Court of Appeal argued that the parties had agreed that the additional works were to be covered by the arbitration agreement, either explicitly during the negotiations that took place or by means of Belgor's passivity and implied actions. The Court of Appeal found that Koca had not succeeded in establishing the existence of such separate agreement. The Supreme Court did not address this alternative ground. It is not clear from the judgment whether this was due to Koca withdrawing the assertion or because the Supreme Court did not consider it necessary to rule upon it (given that Koca's first ground was accepted).

conclude *that* there were three parties to the Construction Agreement but only two to the service agreements, *that* the Additional Works were based on several different order placements of which at least one did not have an apparent connection to the Construction Agreement[16] and *that* all orders were placed after Belgor had terminated the Construction Agreement. According to the Court of Appeal, these circumstances implied that the Additional Works were covered by later established, autonomous legal relationships and not by the Construction Agreement. In view of the foregoing, the Court of Appeal found that Koca had not substantiated that the Additional Works were attributable to the legal relationship regulated by the arbitration agreement. The hesitance to expand the scope of the arbitration agreement was based on previous Supreme Court case law, which, as already noted, indicates a restrictive interpretation of arbitration agreements and the term 'legal relationship'.[17] The award was partially set aside.[18]

The Supreme Court reasoned differently and rejected the challenge application. In doing so, the Supreme Court made some innovating statements and outlined the following legal starting points:

- First, the Supreme Court reiterated the basic notion that parties cannot refer all their future disputes to arbitration in an arbitration agreement given the mandatory requirement in section 1(1) of the (SAA) that there must be an 'identified legal relationship'.[19] The underlying rationale of this requirement, the Supreme Court said, is to provide the parties with the ability to foresee the consequences of the arbitration agreement.
- The Supreme Court went on to state that when determining the scope of an arbitration agreement, general principles of Swedish law on contract interpretation apply.[20] However, as the wording of arbitration agreements often is in a standardized form, the Supreme Court concluded that there seldom exist specific circumstances upon which it is possible to determine a specific common intention of the parties. It went on to state that in instances where the

16. The order referred to concerned an order for works regarding construction of installations in connection with a visit by the President of Turkmenistan.
17. The Court of Appeal particularly relied on the following statement, first made in NJA 2010 p. 734, para. 14 (repeated in NJA 2017 p. 226, para. 10): '*The fact that there is a connection between a disputed legal relationship and another legal relationship which is covered by an arbitration agreement can only in exceptional cases and under very special circumstances cause the arbitration agreement to be extended to include the disputed relationship.*'
18. In addition to finding that the arbitral tribunal wrongly had assumed jurisdiction over the claim regarding the Additional Works, the Court of Appeal further found that the arbitral tribunal had committed a procedural error by wrongly assuming that the parties had agreed that interest should commence to accrue on the invoice date. It was undisputed that the awarded compensation for the Additional Works plus interest and other interest amounted to USD 900,875 and USD 1,662,794, i.e., separable parts of compensation awarded in item (i) of the operative part of the award. The relevant compensation was also deemed separable from other parts of the award. Therefore, the arbitral award was only annulled to the extent item (i) of the operative part of the award dealt with the amount USD 2,563,669 (USD 900,875 + USD 1,662,794). The residual part of Belgor's liability under the award (i.e., USD 6,603,733.52 plus litigation costs) thus remained unaffected.
19. *Belgor* para. 12.
20. *Belgor* para. 13.

wording provides for differing interpretations and other relevant interpretation data give no guidance, it is natural to start with the view that the arbitration agreement should fulfil a sensible function and serve as a reasonable set of rules for the parties' respective interests. The assumption, the Supreme Court said, is that parties to a commercial relationship wish to have disputes within the scope of their relationship resolved swiftly and in one cohesive proceeding before one single forum, i.e., an arbitral tribunal appointed by them. The Supreme Court emphasized that a different approach entails the risk of time delays, increased costs and contradicting decisions in matters that are connected.[21]

- The Supreme Court further underlined that when interpreting arbitration agreements and the Act's term 'legal relationship', the principles of the New York Convention should be taken into account. The Supreme Court held that these principles, which serve the purpose of ensuring uniform recognition of arbitration agreements and facilitating the enforcement of arbitral awards, have been taken to justify an extensive interpretation of both the arbitration agreement and the convention's concept of a 'legal relationship' in foreign case law and international jurisprudence.[22]
- The Supreme Court added that the term 'legal relationship' does not only cover those rights and obligations that have been set forth in an original agreement. Subsequent legally relevant circumstances, which alter the content of the agreement, fall within the scope of the term and thereby within the scope of application of an arbitration clause set out in the original agreement.[23]
- Interestingly, having already established a presumption that parties ordinarily do not intend to split disputes that are closely linked between different fora, the Supreme Court also established another presumption. It held that, typically, it is the arbitral tribunal which is best positioned to determine the issue of its own jurisdiction.[24] The starting point for a court is therefore that the arbitral tribunal's interpretation and evaluation of evidence is correct (or, in other words, that its decision should be accepted). Based on this starting point, the Supreme Court held that it is for the party contesting jurisdiction in a challenge proceeding to show that the arbitral tribunal has made an incorrect assessment of the scope of the arbitration agreement.[25]

Having laid down these legal starting points, the Supreme Court made an assessment in casu and found that the contesting party (Belgor) had not invoked any circumstances that constituted grounds for rejecting the arbitration tribunal's assessment of its jurisdiction. Hence, the award was upheld.

21. *Belgor* paras 13 and 18.
22. *Belgor* para. 14. Reference was made to Born, *supra* n. 1, pp. 1317 et seq. and Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1994) 259.
23. *Belgor* para. 15 (the same statement was made in NJA 2017 p. 226, para. 14).
24. *Belgor* para. 19.
25. *Belgor* para. 20.

§5.03 DISCUSSION

[A] The Significance of the Parties' Intentions: Genuine and Hypothetical

The Supreme Court stated that general principles of Swedish contract law on contract interpretation apply when defining the scope of an arbitration agreement. It bears mentioning that according to these principles, the ultimate objective is to determine the common intention of the parties at the time of conclusion of the contract. The rule of *falsa demonstratio non nocet* provides that if a written agreement does not show the common intention, the written text is disregarded.[26] Hence, the starting point for determining the scope of an arbitration agreement is, as with any other commercial agreement, the parties' *genuine* intentions, if such intentions can be established. This state of affairs has not been altered by *Belgor*. Rather, it has been confirmed.[27] In case if it can be proven that the intention of the parties was to limit the jurisdiction of the arbitrators to only some disputes or to certain clearly defined issues, such consensus will override all other circumstances. The same applies if it can be established that one party intended to limit the jurisdiction of the arbitrators to only certain matters and that, at the time of the conclusion, the other party must have been aware of the first party's intention but made no objection.[28]

This being said, once a dispute has arisen, it is often difficult to establish the existence of a common intention and to determine what that common intention may have been. Other objective factors must then be considered. Although due consideration must be given to all relevant circumstances, considerable weight is often given to the wording of the contract (provided that the wording is clear and unambiguous). A party that asserts that the common intention differs from a clear wording faces a heavy burden of proof.[29]

However, it is seldom the case that arbitration agreements are negotiated and agreed against the background of the individual circumstances surrounding the main contract. Rather on the contrary, the arbitration clause in a commercial contract is oftentimes one of the clauses least deliberated (if at all consciously considered by the parties).[30] Typically, even where counsels are involved, either a model clause is used or a prior clause in another contract is copied and pasted. The Supreme Court took notice of these facts when stating that since the wording of arbitration agreements, which often provide for differing interpretations, typically is in a standardized form, there seldom exists specific circumstances upon which it is possible to determine a specific common intention of the parties. It was precisely from that conclusion that the

26. Adlercreutz & Gorton, Avtalsrätt II (Lund, 2010), 58.
27. *See* especially the statement in para. 13 that '*[I]n instances where the wording provides for differing interpretations and other relevant interpretation data give no guidance, it is natural to start with the view that the arbitration agreement should fulfill a sensible function […]*.'
28. *See* Lando et al., *Restatement of Nordic Contract Law* (Copenhagen: Djøf Publishing, 2016), § 5-2 with extensive references.
29. Lando et al., *supra* n. 28, at 175.
30. This is why they are often referred to as 'midnight clauses'.

established presumption and default rule emanated; in instances where the wording and other relevant interpretation data give no clear guidance, there is (a rather strong) presumption that commercial parties, as rational business entities, are likely to prefer a dispute resolution mechanism that can deal with all types of claims in a single forum. In practice, this usually means that in cases where the wording of the arbitration agreement allows for two interpretations as to the scope, courts and tribunals will henceforth lean towards the more extensive interpretation. That, in the words of the Supreme Court, allows the arbitration agreement to fulfil a sensible function and serve as a reasonable set of rules for the parties' respective interests.[31]

[B] The Handling of the Identification Requirement

As explained above, when determining the scope of an arbitration agreement, two separate but closely related issues arise. The first is a contract interpretation issue. The second issue is a law interpretation issue. The scope of an arbitration agreement is limited by the mandatory *identification requirement* that future disputes must concern an identified legal relationship. An arbitration agreement is not valid if the scope is wider than this. In other words, it must be examined whether the scope determination after a proper contract interpretation corresponds to the legal requirement that the legal relationship is identified in the arbitration agreement.

The identification requirement can be interpreted in two different ways.[32] One way of interpretation is that an arbitration clause contained in a main contract is valid to the extent that it relates to the legal relationship that the main contract constitutes and invalid in so far as it relates to other legal relationships, regardless of whether they are related or not. The other is that an arbitration agreement is valid as soon as an identified legal relationship is the subject of the arbitration clause, namely the contract in which the arbitration clause is included. The question of whether the valid arbitration agreement may include related legal relationships would then amount to a question of interpretation and not a question of validity.

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31. One issue that arises as a result of the judgment is whether the party relying on the arbitration agreement is required to explicitly introduce and invoke the (*hypothetical* or *reasonable*) common intention of the parties as a factor relevant to the question of the interpretation and scope of the arbitration agreement and thus, ultimately, to the arbitral tribunal's jurisdiction. That depends on whether or not such intention can be regarded as a material circumstance or *legal fact* (Sw. '*rättsfakta*'), or as part of a legal fact. Swedish procedural law makes a distinction between such facts and evidentiary facts (Sw. '*bevisfakta*'). A legal fact is a fact of direct relevance in the sense that a legal consequence (Sw. '*rättsföljd*') is linked to it, whereas an evidentiary fact is a fact of indirect relevance in the sense that its importance lies its evidentiary value in relation to a legal fact. Neither a judge nor an arbitrator is allowed to base his decision on a legal fact not invoked by the parties. Hence, in case an award has been based on a legal fact not invoked by a party, the arbitrators' have exceeded their mandated and the award may be set aside. Following the Supreme Court's judgment, the extensive interpretation principle, based on a reasonable hypothetical common intention, must be considered as a general principle of law. As such, it does not require an invocation of any ultimate fact. The opposite applies to allegations regarding the parties' actual intentions.
32. Heuman, *Har det skett en omsvängning eller omläggning av praxis från restriktiv till extensiv tillämpning av skiljeavtalet?* (SvJT 2019) 534 et seq., at 536.

Another suggested approach has been that the legal relationship that an arbitration agreement should be considered to cover, after a proper contract interpretation, should also be considered as identified in the meaning of section 1(2) of the Act, provided however that the disputed legal relationship had already arisen when the arbitration agreement was concluded.[33] In such case, it will be sufficient with a scope determination based on contract interpretation. The added additional condition is based on the view that it is not possible to identify a legal relationship that did not exist at the time of the conclusion of the arbitration agreement, something which may have special importance in the context of supplementary agreements entered into after the conclusion of the main contract containing the arbitration agreement.[34]

In the authors' view, the Supreme Court's decision in *Belgor* best fits the second interpretation alternative.[35] As will be recalled, the Supreme Court expressly stated that '*the scope of an arbitration agreement is to be determined pursuant to the general principles for contract interpretation*'.[36] The Supreme Court also expressly held that the term 'legal relationship' shall be given a wide interpretation, in accordance with the underlying principles behind the New York Convention. A relaxation of the identification requirement was therefore achieved. If the intention had been to express that the identification requirement would impede a wide contract interpretation based on the assumption that '*parties to a commercial relationship wish to have disputes within the scope of their relationship settled by one single forum*',[37] the Supreme Court would arguably have said so. It did not. The outcome of the case, as well as other statements in the Supreme Court's reasoning, is also consistent with and clearly point in the direction that an expansion of the arbitration agreement may be made to include legal relationships that are closely connected to the legal relationship primarily covered by the arbitration agreement (i.e., the main contract), regardless of whether they existed or not at the time of the conclusion of the arbitration agreement. For instance, the Supreme Court stated that a ground outside the contractual relationship could be deemed to fall inside the applicable scope of the arbitration clause, whereby reference was made to NJA 2007, p. 475.[38] In that case, A and B had entered into an agreement that gave B the right to remove road maintenance substances from a land area belonging to A during a certain period of time. B filed an application with the county administrative board for a permit to continue to remove substances after the said

33. Cf. Lindskog, *Skiljeförfarande* (JUNO, last updated 2018-09-07), section I:0-6.2.2.
34. Lindskog, *supra* n. 33, section I:1-5.1.2 footnote 703 and section I:1-5.1.3. However, Lindskog also argues that the arbitration agreement could be extended to include legal relationships that arise subsequent to the conclusion, but such extension requires evidence that the parties intended the arbitration agreement to apply once the new legal relationship arose (e.g., once a supplementary agreement was entered into). If that is the case, the arbitration agreement can be extended to include the subsequent legal relationship. Cf. in this context Koca's alternative ground and *supra* n. 15.
35. Cf. Heuman, *supra* n. 32, at 538, 546 et seq. and 549 set seq. (although expressing some doubts).
36. *Belgor*, para. 13.
37. *Belgor* paras 13 and 18.
38. *Belgor* para. 17.

period. A brought an action against B claiming compensation. As the basis for its action, A claimed in the first place that the parties were still in a contractual relationship and that B by breaching its duty of loyalty had incurred liability. In the alternative, A argued that there was a contract-like relationship which resulted in liability. Third, A pleaded that the representative of B who had applied for a permit was guilty of fraudulent procedure. The third ground was thus non-contractual in nature. The Supreme Court nevertheless found that the arbitrators had jurisdiction. According to the Supreme Court in *Belgor* '*the non-contractual ground was deemed so closely related to the other grounds for the action that also the former ground was deemed covered by the arbitration clause*'. It is clear that the conduct giving rise to the non-contractual liability – constituting a separate legal relationship – occurred after the conclusion of the arbitration agreement.[39]

It follows that arbitral tribunals and courts should make a contractual analysis in order to determine whether a claim related to a closely connected legal relationship is covered by the arbitration agreement. That is a question of interpretation and not validity.[40]

39. *See also infra* n. 44. A different matter is that NJA 2007 p. 475 has been called into question (rightly, in the authors' view) on the basis that the Supreme Court appears to have failed to apply the doctrine of assertion; the claimant itself had alleged that the claim was not based on the main agreement which included the arbitration agreement, which should have been the decisive. In this regard, it may be mentioned that one commentator has argued that the Supreme Court in *Belgor* has abolished the doctrine of assertion (Madsen, *Har varit en udda fågel – HD skrotar påståendedoktrinen inom skiljedomsrätten*, Dagens Juridik 2 Apr. 2019 and 'The Swedish 'Belgor' case and the scope and applicability of arbitral agreements, Tvistlösning inom affärsrätten 21 Feb. 2019, 93 et seq.). The authors strongly disagree. Amongst other things, Madsen finds it remarkable that the Supreme Court in *Belgor* '*did not with a word mention the doctrine of assertion in its decision.*' The reason is, however, simple: the doctrine was of no relevance to the Supreme Court's decision (nor to the arbitral tribunal's award, cf. Schöldström, '*Nej, HD skrotade inte påståendedoktrinen i Belgor-målet – även om det hade varit en välgärning*', Dagens Juridik 16 Apr. 2019). The doctrine of assertion only means that the arbitral tribunal shall not, in case it decides on its jurisdiction in the beginning of the proceedings, assess the existence of the material facts that a claimant claims are covered by a legal relationship within the scope of an arbitration agreement. When deciding on the jurisdiction, the arbitral tribunal shall instead assume that these material facts are present. The effect is that jurisdiction can be established without having to consider and assess the merits of the case. In other words, the opposite party has to accept arbitration even though the material circumstances invoked may not be true or proven. If the claimant's claims are later found to be unproven, the case will be dismissed on the merits rather than rejected for lack of jurisdiction. In addition, and as Madsen himself correctly observes in his article, one starting point for the doctrine of assertion to apply is that the material facts that the claimant references in support of its claim shall fall within the scope of the arbitration agreement, either because it is undisputed or because it has been legally established. That was obviously not the case in *Belgor*.

40. It may be mentioned that the identification requirement does not appear to have obstructed an expansion to related legal relationships as to scope determinations *ratione personae*. Hence, the Supreme Court has in some fairly old judgments declared that an arbitration agreement contained in a contract between the debtor and the creditor is applicable also to the legal relationship between the creditor and the guarantor, i.e., that created by the guarantee (NJA 1896 p. 136 NJA 1916 p. 100 and NJA 1922 p. 135, all confirmed in RH 1985:135; *see also* RH 2003:61).

[C] The Scope of the Extensive Interpretation Principle

As already mentioned, by its judgment in *Belgor*, the Supreme Court deviated from previous declarations rejecting an extensive interpretation of arbitration agreements. The case has been criticized on the grounds that such previous statements were silently bypassed and for not having stated clearly enough that a reversal in jurisprudence was produced.

As one commentator correctly has observed, the previous statements supporting a restrictive interpretation of arbitration agreements concerned cases where the arbitration agreement had been invoked as a bar to initiated court proceedings. Therefore, the case can be made that it cannot be completely ruled out that the presumption that an arbitration agreement should generally be interpreted expansively is applicable solely in challenge and enforcement proceedings.[41] However, such an approach would not promote legal certainty. The same rules of interpretation should apply regardless of the context and fora in which the issue is being raised. The ultimate consequence would otherwise be that the scope of an arbitration agreement could depend on which party that first succeeds in having the issue of the scope of an arbitration agreement tried by a court or arbitral tribunal.[42] It is arguable (and in fact quite plausible) that the Supreme Court did not intend to create such a legal state of affairs and that the Supreme Court wilfully and knowingly dissociated itself from the previous statements mentioned, with the clear purpose to align the Act with the New York Convention and the principles generally applied in international arbitration.[43]

In this context, it also bears mentioning that the previous Supreme Court cases were all mentioned in the reasoning of *Belgor*, but the statements supporting a restrictive interpretation were not cited. If the Supreme Court had intended that these statements would continue to be guiding and authoritative in court proceedings not preceded by arbitral proceedings, the Supreme Court would arguably have stated so. It did not.[44]

41. Heuman, *supra* n. 32, at 549 et seq. Hueman does not take an explicit stand but merely concludes that it is not possible to draw any certain conclusions, although he seems prepared to lean towards the conclusion that the extensive interpretation principle is of general application (*see infra* n. 47).
42. Heuman, *supra* n. 32, at 550.
43. *See* especially paras 13 and 14 of the judgment. It also bears mentioning that the Supreme Court in NJA 2017 p. 226 para. 12 stated by way of an obiter dictum that the fact that there is a connection between a disputed legal relationship and another legal relationship which is covered by an arbitration agreement only in exceptional cases and under very special circumstances can cause the arbitration agreement to be extended to include the disputed relationship, and that such an exceptional case had arisen in NJA 2007 p. 475 (*see supra* n. 29). That reservation, which substantially narrowed down the scope of the judgment in NJA 2007 section 475 from what can be read from the judgment itself, was not repeated (or, in other words, was intentionally left out) in *Belgor* (cf. para. 17). According to the authors, this further supports the conclusion that *Belgor* overturns previous case law. A different matter is whether this reversal will hold (cf. the following footnote).
44. It might be mentioned that four of the five justices that adjudicated the dispute are experienced arbitrators who are regularly appointed in international arbitrations seated in Sweden. Although the composition of the seat in principle should not have any effect on the outcome, it remains to be seen whether the Supreme Court will continue along the chosen path.

To conclude, the important statements relating to the determination of the scope of arbitration agreements are arguably of general application, and the guidance that the Supreme Court gave is relevant regardless of in what type of proceedings the issue arises. This means that Swedish courts should also adopt a liberal construction approach with respect to actions under section 4(a) of the Act (i.e., when faced with a declaratory action with respect to the jurisdiction of the arbitrators), as well as when faced with a jurisdictional objection based on an arbitration agreement.

[D] The Second Presumption

The Supreme Court also established another, somewhat more controversial, presumption. As will be recalled, the Supreme Court held that, typically, it is the arbitral tribunal which is best positioned to determine the issue of its own jurisdiction. The starting point for a court should therefore be that the arbitral tribunal's interpretation and evaluation of evidence is correct. Based on this starting point, or rather presumption, the Supreme Court established that it is for the party contesting jurisdiction in a challenge proceeding to show that the arbitral tribunal has made an incorrect assessment of the scope of the arbitration agreement. The same line of reasoning was adopted by the Supreme Court in *Kalle Bellander i Stockholm AB v. Planavergne S.A., Fontane,* NJA 2003 p. 379 (*Kalle Bellander*), to which reference was made.[45] That case concerned the enforcement of a foreign arbitral award.[46]

Exactly what this presumption means is unclear. It relates to the general issue of what effect, if any, that courts should give to arbitrators' jurisdictional rulings, and it effectively provides for a certain standard of review to be applied when courts examine issues regarding the scope of an arbitration agreement. On a principal level, there are two extreme positions that can be taken in this regard. One is that the courts should address the scope of an arbitration agreement only in the most superficial manner and under a very summary (prima facie) standard. An advocate for such approach is Born, who has argued that:

> Disputes over the scope of the arbitration agreement involve a concededly valid arbitration agreement, consensually selecting a neutral tribunal with unchallenged authority to interpret the parties' underlying contract, which is often a key element in disputes over the scope of the arbitration agreement; again, the arbitral tribunal will often include members who are qualified and expert in the law governing the underlying contract, usually also having relevant commercial expertise. It makes very little sense for U.S. (or other) courts to ignore the views of the arbitrators regarding the scope of the arbitration agreement in these circumstances.[47]

45. That judgment has been the subject of severe criticism by Lindskog, *see* Lindskog, *supra* n. 33, section 54:5.1.3.
46. *See also* NJA 2009 not N 9.
47. Born, *supra* n. 1, at 1199 et seq.; cf 3298: '*The scope of a tribunal's authority is necessarily intertwined with substantive decisions about the meaning of the parties' underlying contract, which the parties have committed to the arbitrators' determination, and the tribunal's resolution of these issues should be accorded substantial deference.*'

The other extreme position is that the appropriate court should make a full and de novo enquiry as to scope issues, without taking any account of the reasoning of the arbitral tribunal. This approach can be considered to be most consistent with the fact that the judicial *ex post* control in challenge and enforcement proceedings, after all, is a *remedial* function intended to constitute a procedural safeguard. The procedural safeguard lies in the very fact that a full review is made.[48] To use a metaphor, there is a danger in shielding the arbitrators' jurisdictional assessment from independent judicial scrutiny as it would leave 'the foxes in charge of guarding the chicken coop'.

The judicial practice on matters relating to what deference that should be given to the arbitrators' decision on their competence varies between jurisdictions. There appears to be support for both extreme positions and everything in between.[49]

There is an argument that the judicial reviewability of an arbitral tribunal's determination on the scope of its own jurisdiction should differ depending upon whether the court is concerned with challenge of a Swedish award or enforcement of a foreign award. The reason would be that in cases of enforcement of a foreign award, foreign law normally governs the arbitration agreement. That was also the situation in *Kalle Bellander*. The Supreme Court expressly took into account that:

> In the present case, it should also be borne in mind that French law governs the question of whether a valid arbitration agreement has been entered into. Against this background […] there is reason to assume in the enforcement proceeding that the interpretation and evaluation of evidence made by the arbitral tribunal based on the material it had available is correct.[50]

When foreign law is applicable to the arbitration agreement, it appears reasonable that a Swedish court as a starting point respects the assessment made by a tribunal consisting of internationally active arbitrators. Such tribunal may even be considered better equipped to try the issue of its own jurisdiction in the given situation.[51] Conversely, in challenge proceedings, Swedish law typically governs the arbitration agreement (which was also the case in *Belgor*).[52] That means that Swedish law determines issues such as allocation of the burden of proof, applicable evidentiary requirements, substantive principles of interpretation and validity requirements.[53] It has, on good grounds, been questioned if not Swedish courts should have at least as good (or perhaps even better) a position as an arbitral tribunal to assess issues as to the scope of the arbitration agreement when Swedish law applies to the arbitration agreement.[54] This is true not least in cases where the arbitral tribunal consists of

48. Lindskog, *supra* n. 33, section 54:5.1.3.
49. *See* Born, *supra* n. 1, at 3296 et seq. (annulment) and 3547 et seq. (enforcement).
50. *Kalle Bellander*, at p. 383.
51. Heuman, *Bevisbördan för skiljeavtal och tolkningsresonemang som grund för skiljebundenhet*, JT 2011/12, 663. For a different opinion, *see* Lindskog, *supra* n. 33, section 54:5.1.3.
52. If the place of arbitration is in Sweden, Swedish law will govern the arbitration agreement, unless the parties have agreed otherwise, *supra* n. 5.
53. Specifically the arbitrability and identification requirements.
54. Heuman, *supra* n. 32, at 534 et seq., at 549, and Schöldström, *Har Belgor förändrat prövningen av en skiljenämnds behörighet och handläggningsfel?* (JT 2019) 243 et seq., at 245.

foreign arbitrators with little or no experience of Swedish law.[55] There is also a convincing argument that the Supreme Court, as a precedential body, should take the lead over the development of the law and not yield to the various assessments made by arbitral tribunals to the different issues that can arise when determining the scope of an arbitration agreement under Swedish law.[56] Importantly, when challenge proceedings concern the question of whether an arbitration agreement extends to a particular dispute, it must be expected that the award already contains statements on this issue. If the claimant in the challenge proceedings has not made a jurisdictional objection during the arbitral proceedings, a challenge action will be pointless as that party will be deemed to have waived its right to rely on such ground for challenge.[57]

One may also consider instances where the two presumptions established by the Supreme Court in *Belgor* operate in different directions. The practical example is that the arbitral tribunal has applied a restrictive interpretation to the arbitration agreement. In a subsequent challenge proceeding, the court must then assume that the tribunal has made a proper assessment by its restrictive interpretation, but at the same time the court should consider the first presumption rule favouring an extensive interpretation. In such case, there would be support for both a restrictive and an extensive interpretation.[58] It is somewhat unclear as how such a situation should be resolved. One way of dealing with this issue could be that the second presumption should not be considered applicable in cases where the arbitral tribunal has erroneously applied a restrictive interpretation approach, in contradiction with the first presumption established in *Belgor*. It is only when the tribunal has applied a broad interpretation to the scope of arbitration agreements based on the presumption that the parties desire a single dispute resolution mechanism before one adjudicatory body for all disputes relating to their agreement that the second presumption comes into play. Such an approach would also make it easier to accept that the starting point for courts should be that the arbitral tribunal's assessment is correct. A relatively broad 'pro-arbitration' rule of interpretation based on the assumption that the parties wish for an all-encompassing jurisdiction of the arbitral tribunal corresponds to international standards and does not require in-depth knowledge of Swedish case law (anymore). On the other hand, the outer limits of the identification requirement should normally be a matter for courts to decide independently of the arbitrators' own jurisdictional findings.

To summarize, it is clear that the second presumption entails that an arbitral tribunal's decision on its own jurisdiction is to be given some degree of judicial deference, but it still leaves the ultimate decision as to scope issues to the Swedish

55. In the arbitration proceedings between Belgor and Koca, only the chairperson was a Swedish lawyer. The parties had not invoked any Supreme Court case law and the tribunal made no reference to such case law in its determination on the scope of the arbitration agreement.
56. Heuman, *supra* n. 51, at 663.
57. *See* section 34(2) of the Act, which provides that a party forfeits its right to rely upon a ground for challenge which, through participation in the proceedings without objection, or in any other manner, the party may be deemed to have waived. However, examples might be conceivable, in which a party does not realize that the arbitrators have gone beyond the scope of the arbitration agreement until after an award has been rendered.
58. Heuman, *supra* n. 32, at 548.

courts. However, given the great importance that the second presumption arguably will have for arbitral proceedings seated in Sweden, one must hope that the Supreme Court will soon clarify the second presumption's closer meaning and that it will make more distinct how careful and meticulous the courts' judicial scrutiny should be.[59] It would also be useful if the Supreme Court gives its view on whether a distinction should be made between challenge and enforcement proceedings (or, rather, whether a differentiation is required depending upon the law governing the arbitration agreement).

It is clear, however, (at least to the authors) that the Supreme Court limited the second presumption to arbitral determinations of scope issues *rationae materiae* under an unquestionably valid agreement to arbitrate.[60] Hence, from the judgment follows no presumption that an arbitral tribunal's determination on scope issues *rationae personae* is correct.[61]

Conversely, it is somewhat unclear to what extent the established presumption will be considered applicable in proceedings under the new section 2(2) of the Act (which provides that if the arbitral tribunal renders an interim decision affirming its jurisdiction, a party may appeal against the decision to a Court of Appeals within a thirty-day period). In the authors' view, if a presumption of the kind in question is to apply in challenge proceedings, there is no reason why it should not apply in proceedings under section 2(2) of the Act.

[E] The Burden of Proof

The second presumption led the Supreme Court to conclude that it is for the party contesting jurisdiction in a challenge proceeding '*to show*' (Sw. *visa*) that the arbitral tribunal has made an incorrect assessment of the scope of the arbitration agreement. One commentator has argued that the Supreme Court did not place a burden of proof on the party contesting jurisdiction (i.e., the claimant in challenge proceedings) by this statement, *inter alia*, on the basis that the tribunal's assessment can hardly be

59. One possible source of inspiration could be the standard of review that is applied in retrospect with regard to the arbitral tribunal's determinations on competition law issues. Here, the review is aimed at whether the arbitral tribunal's conclusions are based on an acceptable legal analysis, rather than whether these conclusions correspond to those of the court. As long as the conclusions of the arbitral tribunal are reasonably motivated and fall within the scope of what could reasonably be concluded from competition case law and jurisprudence, the award will be not be declared invalid (*see Systembolaget Aktiebolag v. The Absolut Company Aktiebolag*, NJA 2018 p. 323, para. 16). This means that a court, in order to be in a position to determine whether an arbitration award should be deemed invalid due to peremptory competition law provisions, must undertake a certain – but not full – review of the merits of the arbitral tribunal's decision on the competition law issues. Also, this review relates solely to the tribunal's legal reasoning, and is not aimed at re-evaluating the tribunal's evidential findings, unless particular reasons exist to do so (*ibid.*, para. 17).
60. This as opposed to NJA 2003 p. 379, where the issue was whether a valid agreement had been entered into. *See also infra* n. 62.
61. Naturally, the same is true for determinations on arbitrability issues.

considered as an issue in the fact that can be proven right or wrong.[62] The authors agree with this proposition and submit that it holds especially true as regards the arbitral tribunal's interpretation of the arbitration agreement, which is clearly an issue of law and which cannot be treated as a factual circumstance subject to proof. In this context, it also bears mentioning that the Swedish word '*visa*' can be used in many different meanings and does not necessarily have to address issues of evidence.

The better understanding is probably that it is up to the claimant in the challenge proceedings to put forth compelling arguments explaining why the arbitrators' earlier consideration of the matter should not be accepted. Rather than *proving* that the tribunal made an incorrect assessment, it is a matter of *convincing* a court that the tribunal's evaluation of evidence is clearly erroneous or that it made a too far-reaching interpretation of the scope of the arbitration agreement. Importantly, under Swedish law, an arbitral tribunal is obliged to apply the fundamental principle that it is the party alleging that an arbitration agreement has been formed and who wishes to invoke the arbitration agreement in his own favour that has the burden of proving the facts and circumstances from which the arbitral tribunal should draw the conclusion that a valid arbitration agreement has been formed.[63] The burden of proof in the arbitral proceedings is in principle the same when it comes to determining whether the scope of an existing arbitration agreement extends to a particular dispute.[64]

62. Schöldström, *supra* n. 54, at 245 et seq. However, in the authors view, a rule that would provide that it be up to the claimant in challenge proceedings to show (prove) that the arbitral tribunal has made an incorrect assessment of the scope of the arbitration agreement would not be incompatible with the fundamental principle that the burden of proof of the existence of an arbitration agreement is on the party relying upon the agreement. These are separate issues. It could very well be that the burden of proof for the existence of an arbitration agreement stays on the party asserting its existence, while the allocation of the burden of proof shifts when it comes to determining whether the scope of an existing (proven) arbitration agreement extends to a particular dispute in challenge proceedings. The Supreme Court's statement is explicitly limited to the arbitral tribunal's determination *of the scope of the arbitration agreement*, once established. The basic principle that the burden of proof *of the existence of an arbitration agreement* is on the party relying upon the agreement thus remains unaffected.
63. Lindskog, *supra* n. 33, section I:0-2.1.3 footnote 37, Heuman, *Skiljemannarätt*, 1999, pp. 49, 55, 59, 235 et seq. and 591 et seq. and Heuman, *supra* n. 51, at 650 and 653.
64. However, since the Supreme Court in *Belgor* has adopted an expansive interpretation principle and rather strong presumption as to the scope of the arbitration agreement that favours the party invoking the arbitration agreement to its advantage, the burden of proof in this context has become less relevant. The established strong presumption that commercial parties want all their disputes to be resolved in a single proceeding (rather than in multiple proceedings in different forums) will often play a decisive role in determining the scope. As the reasoning typically will be based on an average and *hypothetical* mutual intention of reasonable commercial parties (save where there is clear evidence and interpretation data suggesting that the parties intended to limit the scope), the party relying on the arbitration agreement will in effect escape a burden of proof. The interpretation will thus be based on normative considerations when the factual circumstances invoked in support of a certain common intention are not deemed conclusive (refer to the matter of principle Heuman, *supra* n. 51, at 664 et seq.).

§5.04 CONCLUDING REMARKS

By its judgment in *Belgor*, the Supreme Court has adapted Swedish arbitration law to the international developments discussed above by applying a broad interpretation to the scope of arbitration agreements and at the same time relaxing the statutory identification requirement. The presumption is mandated by a reasonable assumption that parties to arbitration agreements typically, as rational business entities, wish for a single dispute resolution mechanism before one adjudicatory body for all disputes relating to their agreement rather than multiple proceedings that entail increased costs, delays and great risks of inconsistent results in matters that are connected. A presumption of this kind has long been applied in most developed national arbitration regimes and by international arbitral tribunals.

A few difficulties of application remain to be solved with respect to the second presumption, which is somewhat more controversial and requires clarification. When state courts lend state power to enforce an arbitral award, there must arguably be some kind of independent examination of the scope the arbitration agreement, from which the tribunal draws its power to render a binding award at first hand. It remains to be seen how the judgment will be received in the arbitration community. It seems likely, and indeed one must hope, that *Belgor* will not be the last word on this very important topic.