CHAPTER 10

Two Parties – Several Contracts: A Four-Step Method for Assessing Arbitral Tribunals' Jurisdiction Post *Belgor*

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A contractual relationship between two commercial parties often consists of multiple contracts that are more or less connected to each other. In such a multi-contract context, it may happen that only one contract (typically the main contract) contains an arbitration clause while the other contracts (successive or ancillary) either lack arbitration clauses or contain other or somewhat different dispute resolution mechanisms. If a dispute arises regarding any of the other contracts, the arbitral tribunal will often have to determine whether such dispute is covered by the arbitration clause in the main contract.

In this chapter, a proposed four-step method for determining arbitral tribunals' jurisdiction in multi-contract contexts under Swedish law is presented. By presenting this method, the ambition is to answer the question of under what circumstances an arbitration clause in one contract may cover disputes regarding another contract between the same parties.

The proposed method addresses the implications from the most recent Swedish precedent on assessing arbitral tribunals' jurisdiction under Swedish law – *Belgorkhimprom v. Koca* (NJA 2019 p. 171, *Belgor*).

§10.01 INTRODUCTION

A contractual relationship between two commercial parties often consists of multiple contracts that are more or less connected to each other. In such a multi-contract context, it may happen that only one contract (typically the main contract) contains an arbitration clause, while the other contracts (successive or ancillary) either lack

arbitration clauses or contain other or somewhat different dispute resolution mechanisms.[1] If a dispute arises regarding any of the other contracts, the arbitral tribunal will often have to determine whether such dispute is covered by the arbitration clause in the main contract. In many cases, this will boil down to an interpretation of the scope of the arbitration clause.

Internationally, the trend is to interpret the scope of an arbitration agreement extensively.[2] This seems to be true both when interpreting arbitration agreements in general and when interpreting arbitration clauses specifically in multi-contract contexts, although in the latter case, an assessment shall be made of the particular circumstances in the case at hand.[3]

Overall, Swedish law corresponds to the international trend. However, there are some national aspects that both arbitral tribunals and counsel in arbitral proceedings seated in Sweden would do well to keep in mind.

In this chapter, a method is presented for determining arbitral tribunals' jurisdiction in multi-contract contexts under Swedish law.[4] By presenting this method, the ambition is to answer the question under what circumstances an arbitration clause in one contract may cover disputes regarding another contract between the same parties. The proposed method consists of four steps and may be summarized by asking the following four questions:

(1) Does the claimant, in support of its claim under the other contract, assert grounds that are covered by a legal relationship (Sw. *rättsförhållande*) within the scope of the arbitration clause in the main contract and, if so, is this sufficient in order for the arbitral tribunal to have jurisdiction?
(2) Have the parties agreed (explicitly or implicitly) that the arbitration clause in the main contract shall also cover claims under the other contract?
(3) Do the main contract and the other contract constitute the same legal relationship, with the result that the arbitration clause in the main contract also covers claims under the other contract?
(4) Is the connection (Sw. *anknytning*) between the two contracts so strong – and the circumstances so special – that it motivates the extension of the arbitration clause in the main contract to claims under the other contract?

If the answer to any of these questions is yes, the arbitral tribunal will – with the reservations presented in this chapter – have jurisdiction. There are thus essentially

1. This chapter deals only with multi-contract situations involving *two* parties. Multi-contract arbitrations involving more than two parties give rise to somewhat different as well as additional jurisdictional problems, which will not be addressed here. Cf. Philippe Leboulanger, *Multi-Contract Arbitration*, 13(4), J. Int'l Arb. 43 (1996), at 44 et seq.
2. Gary B. Born, *International Commercial Arbitration*, 2nd ed. (The Hague: Kluwer Law International, 2014), 1326-1338 and Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration*, 6th ed. (Oxford: Oxford University Press, 2015), para. 2.66.
3. *See*, *e.g.*, Born, *supra* n. 2, at 1345 and 1370-1379.
4. The method is an adaptation of the method presented in Louise Wendleby, *Är skiljenämnden behörig? En probleminriktad studie av skiljenämndens tolkning av skiljeklausuler i sammanhängande avtal* in *Affärsjuridiska uppsatser* (Uppsala: Iustus Förlag, 2020).

four different ways for an arbitral tribunal to determine, on the basis of an arbitration clause in one contract, that it has jurisdiction over a claim under another related contract.

The chapter has the following structure. Section 10.2 introduces some general starting points for the interpretation of the scope of an arbitration agreement under Swedish law. The brief introduction is followed by the presentation of the proposed method in section 10.3. Thereafter, section 10.4 addresses the Swedish Supreme Court's judgment in the case *Belgor* (NJA 2019 p. 171) and its implications for the proposed method. The case is important since it represents the latest of relatively few cases where the Supreme Court has determined whether an arbitration clause in one contract also covers claims under a related contract.[5] Finally, section 10.5 offers some concluding remarks.

§10.02 STARTING POINTS

[A] Points of Departure for the Interpretation of the Scope of an Arbitration Agreement

Under Swedish law, the scope of an arbitration agreement shall be determined according to general principles for contract interpretation.[6] The objective is thus, at least in principle, to ascertain the parties' true intentions in concluding the arbitration agreement. However, arbitration clauses are often the last clauses to be considered – if at all – in the final hour of contract negotiations,[7] and in most cases, the language of the clause is in a standardized form.[8] For these reasons, it is often impossible in practice to determine the parties' true intentions. The wording and other surrounding circumstances may in such situations also allow for different interpretations of the arbitration clause.[9]

5. Apart from in *Belgor*, the Supreme Court has addressed the scope of an arbitration clause in a multi-contract (or multi-agreement) context in the following cases: *G. & L Beijer i Stockholm v. J. Ringborg* (NJA 1910 p. 227), *J. Larsson v. AB nya järnhandeln i Sandviken* (NJA 1919 p. 497), *C.A. Lundborg v. K.I. Gustafsson* (NJA 1922 p. 37), *Hans Schröder AB v. Svenska AB Lebam* (NJA 1964 p. 2), *Byggnadsaktiebolaget Lennart Hultenberger v. Bostadsrättsföreningen Hytten* (NJA 1972 p. 458), *B. Arvold v. Kjellbergs Successors AB* (NJA 1973 p. 620) and *DHL Express (Sweden) AB v. The Bankruptcy Estate of Nordic Logistic Service Oy* (NJA 2005 Note N 8).
6. In *Belgor*, this was explicitly stated by the Supreme Court for the first time (para. 13). However, even before *Belgor* there was a general consensus among legal scholars and practitioners that general principles for contract interpretation should be used when interpreting arbitration agreements, *see, e.g.*, Åke Hassler and Thorsten Cars, *Skiljeförfarande*, 2nd ed. (Stockholm: Norstedt, 1989), 140, Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (New York: Juris Publishing, 2003), 54, Kaj Hobér, *International Commercial Arbitration in Sweden* (Oxford: Oxford University Press, 2011), para. 3.31, and Stefan Lindskog, *Skiljeförfarande* (JUNO version 2C, last updated 7 September 2018), section I:0-3.2.1.
7. For this reason, they are often referred to as 'midnight clauses', *see* Blackaby and Partasides, *supra* n. 2, at para. 2.04.
8. *Belgor* para. 13.
9. *Belgor* para. 13.

To handle this common situation, the Supreme Court has established certain 'starting points'[10] when determining the scope of an arbitration clause. It should be stressed that the starting points are to be used only where the intentions of the parties are unclear and where it is not possible to arrive at one single interpretation of the arbitration clause based on its wording and/or other surrounding circumstances.

First, it is assumed that an arbitration clause covers the *entire* legal relationship that has been constituted by the main contract.[11] If parties wish to limit the application of the arbitration clause to certain issues or to a part of the legal relationship, this must be clearly indicated – for example, in the arbitration clause. A standardized arbitration clause will be deemed to cover the entire legal relationship. Importantly, the term 'legal relationship' shall in itself also be interpreted broadly (*see* further section 10.03[D]).

Second, it is assumed that an arbitration agreement fulfils a rational function and regulates the interests of the parties in a reasonable manner. As a result, when interpreting the scope of an arbitration clause, it is assumed that parties in a commercial contractual relationship intended to have all disputes within that relationship resolved swiftly and in one coherent proceeding before an arbitral tribunal appointed by them.[12]

[B] The Identified Legal Relationship Requirement

A common denominator for the two starting points described above is that they allow for and speak in favour of an extensive interpretation of the scope of an arbitration clause. In essence, the point of departure is that arbitration clauses cover the entire legal relationship established through the main contract and shall provide for a coherent arbitral proceeding for all disputes within that relationship. So far, Swedish law is fully in line with the international trend outlined in section 1.

However, the parties' contractual freedom is ultimately limited by the requirements under section 1 of the Swedish Arbitration Act (the SAA or the Act). The requirements are mandatory and applicable in all cases where the seat of the arbitration is in Sweden, even if the dispute has an international connection, unless the parties have specifically agreed that the law of another country shall apply to the arbitration agreement.[13]

When interpreting arbitration clauses in multi-contract contexts, it is primarily one requirement under section 1 of the Act that becomes relevant. This stipulates that

10. *Tupperware* (NJA 2010 p. 734) at para. 7, and *Belgor* in the headline and paras 13 and 19-20.
11. *Tupperware* (NJA 2010 p. 734) para. 7.
12. *Belgor* para. 13.
13. *See* section 48 of the SAA which deals with the applicable law of the arbitration agreement. Unless the parties have agreed on the law to be applied to the arbitration agreement, the arbitration agreement shall be governed by the law of the country where the arbitration had or shall have its seat. As it is fairly uncommon that the parties have made a specific choice of law with respect to the arbitration agreement, usually Swedish law will be applied to the arbitration agreement if the place of arbitration is in Sweden. *See* further Hobér, *supra* n. 6, at paras 2.201-2.207.

an arbitration agreement may only relate to future disputes pertaining to a *legal relationship specified in the agreement*.

This requirement, often referred to as the *identification requirement* in the legal literature,[14] has the effect that two parties cannot simply agree to refer all their future disputes or a specific type of future disputes to arbitration. In order for the arbitration agreement to be valid, the legal relationship(s) that the future disputes pertain to must be specified or *identified* in the arbitration agreement.[15] It is usually not possible to describe a future legal relationship with sufficient clarity and concretization for the identification requirement to be met. Therefore, the legal relationship identified in the arbitration agreement normally already has to exist or be constituted at the time when the arbitration agreement is concluded.[16]

A similar requirement is found in Article II.1 of the 1958 New York Convention, which stipulates that parties can only agree to submit to arbitration future disputes in respect of 'a defined legal relationship'. Many nations have also adopted similar requirements in their national arbitration laws.[17]

However, while the identification requirement seems to be of little practical importance in most countries,[18] in Sweden, the Supreme Court has put weight on the requirement, emphasizing that in order for a dispute to be covered by an arbitration agreement, it must in fact be based on the legal relationship identified in the arbitration agreement. A dispute based on another, separate legal relationship that has arisen out of or in connection with the legal relationship identified in the arbitration clause is thus, as a main rule, *not* covered by the arbitration agreement.[19] This is the case even if an interpretation of the arbitration agreement according to general principles for contract interpretation would allow for a wider scope. In order for a dispute to fall within the scope of an arbitration agreement, it must thus, with a few exceptions,[20] *be based on the actual legal relationship(s) identified therein*.

14. Stefan Lindskog, *Skiljeförfarande*, 3rd ed. (Stockholm: Norstedts Juridik, 2020), section I:0-6.2.2.
15. Government Bill, 1998/99:35, 210. *See also* Heuman, *supra* n. 6, at 28 et seq., and Lindskog, *supra* n. 14, at sections I:1-5.1.2 and 5.1.3. It is worth noting that the preparatory works of the SAA do not include any explicit discussion regarding the purpose of the identification requirement. However, in the legal literature, the purpose of the identification requirement has often been described as to enable the parties to comprehend the effects of an arbitration agreement they have entered into and to know which types of contractual dispute it refers to. Further, it has been argued that the identification requirement ensures that a party's right to initiate court proceedings is not more restricted than the party actually anticipated at the time of the conclusion of the arbitration agreement. *See*, *e.g.*, Lars Heuman, *Översyn av lagen om skiljeförfarande*, JT 2014/15, at 455 et seq. and Lindskog, *supra* n. 14 at section I:1-5.1.2. Cf. also *The Set-Off Agreement* (NJA 2017 p. 226), at para. 13.
16. *See*, *e.g.*, Heuman, *supra* n. 6, at 29, Fredrik Andersson et al., *Arbitration in Sweden* (Stockholm: Swedish Arbitration Association, 2011), 50. *See also* Lindskog, *supra* n. 14, at sections I:1-5.1.3 who argues that there can be no exceptions to the rule that the legal relationship must already exist when the arbitration agreement is concluded.
17. *See* Born, *supra* n. 2, at 240 and 294.
18. *See* Born, *supra* n. 2, at 294 et seq. with references. Cf. Blackaby and Partasides, *supra* n. 2, at paras 2.25-2.28.
19. *Tupperware* (NJA 2010 p. 734) and *The Set-Off Agreement* (NJA 2017 p. 226).
20. *See* further section 10.03[E] *infra*.

It should be mentioned already at this stage that it has been suggested in the legal literature that the Supreme Court in *Belgor* relaxed or limited the importance of the identification requirement.[21] However, in the authors' opinion, the Supreme Court actually reiterated the importance of the identification requirement in *Belgor*, although the requirement was never really put to the test in the case. The authors will return to this in section 10.04[B] *infra*.

[C] Problematic and Unproblematic Cases Involving the Identification Requirement

In most cases, the identification requirement will not pose any obstacles for the arbitral tribunal when determining its jurisdiction. The model clause for the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC) may be used as an example. It states that:

> Any dispute, controversy or claim arising out of or in connection with *this contract*, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the [SCC] (emphasis added).

In this model arbitration clause, 'this contract' is identified as a legal relationship. Assuming that a dispute arises in the future that is based on the said contract, the identification requirement will be met and, consequently, the arbitral tribunal will have jurisdiction over that dispute.

In other cases, such as in situations involving multiple contracts between two parties, it may however be more problematic to determine whether a dispute is based on a legal relationship that has been identified in an arbitration clause or if the dispute is based on a separate legal relationship. For example, the parties could – following the conclusion of the main contract with the arbitration clause – enter into a subsequent, related contract that lacks an arbitration clause. If a dispute arises based on the subsequent contract, an assessment has to be made as to whether the main contract and the subsequent contract constitute the same legal relationship or if they constitute two separate legal relationships. Only in the first case will the identification requirement be met. This type of problematic situation will be discussed further in section 10.03[D] *infra*.

Lastly, it should be stressed that in practice the identification requirement only becomes an issue if the parties, once a dispute between them has arisen, *disagree* on whether the dispute is covered by the arbitration agreement. If the parties agree that a

21. Anders Reldén and Jacob Frank, *The Belgor Case: Towards an Extensive Interpretation and Application of Arbitration Agreements* in *Stockholm Arbitration Yearbook 2020* (The Netherlands: Kluwer Law International, 2020), 82, and Finn Madsen, *The Swedish 'Belgor' Case and the Scope and Applicability of Arbitral Agreements* in *Tvistlösning inom affärsrätten* (Stockholm: Norstedts Juridik, 2020), 94. Cf. also Lars Heuman, *Har det skett en omsvängning eller omläggning av praxis från restriktiv till extensiv tolkning av skiljeavtalet?*, SvJT 2019, who suggests that the Supreme Court in *Belgor* may have limited the importance of the identification requirement (at 545-547 and 549), while at the same time maintaining that it is not possible to draw any certain conclusions from the case (at 549 et seq.).

dispute that has already arisen shall be resolved in arbitration, or if one party initiates arbitration and the other party does not object to arbitration, then it does not matter whether the dispute is based on another legal relationship than the legal relationship(s) that may have been identified in a previous arbitration agreement. The parties' new agreement will then replace or modify any previous arbitration agreement concluded by the parties.[22]

§10.03 THE PROPOSED METHOD

[A] Introduction

With the general starting points outlined above in mind, this section goes through the different steps which may be included in an arbitral tribunal's assessment of its jurisdiction in a scenario where: (1) the claimant has initiated arbitration on the basis of an arbitration clause in one contract between the claimant and the respondent, (2) the claimant's claim in whole or in part is based on another contract between the parties, and (3) the respondent has, in its statement of defence, made a jurisdictional objection of some sort (i.e., requested that the dispute in whole or in part shall be dismissed due to the arbitral tribunal's lack of jurisdiction).

The proposed method for the arbitral tribunal's assessment of its jurisdiction in this scenario consists of four steps. Depending on the circumstances and the grounds invoked by the parties, it may be relevant for the arbitral tribunal to assess only some of the steps, while in other cases, it may be necessary for the arbitral tribunal to assess all four steps.

For the sake of clarity, the terms 'Contract 1' and 'Contract 2' are used throughout the section to denote the two contracts concluded between the parties. *Contract 1* constitutes the parties' main or original contract containing the arbitration clause which the claimant considers applicable to the dispute, whereas *Contract 2* constitutes the other contract between the parties on which the claimant (partially or wholly) bases his claim. In the scenario discussed in this section, Contract 2 will typically be an ancillary or subsequent contract to Contract 1.

[B] Step 1 – The Doctrine of Assertion

> Does the claimant, in support of its claim under the other contract (Contract 2), assert grounds that are covered by a legal relationship within the scope of the arbitration clause in the main contract (Contract 1) and, if so, is this sufficient in order for the arbitral tribunal to have jurisdiction?

22. Such new agreement may be concluded in writing, orally or through subsequent conduct, *see* Heuman, *supra* n. 6, at 41 et seq., Hobér, *supra* n. 6, at para. 5.11, Anders Reldén and Ola Nilsson, *The Arbitration Agreement* in *International Arbitration in Sweden: A Practitioner's Guide* (The Netherlands: Kluwer Law International, 2013), paras 16-18, and Lindskog, *supra* n. 14, at sections I:0-2.1.2 and IV:0-3.1.2.

When deciding on its jurisdiction, an arbitral tribunal shall always, as the first step, assess if the so-called *doctrine of assertion* (Sw. *påståendedoktrinen*) is applicable. The Supreme Court has stated that it is an 'established principle' under Swedish law that an arbitral tribunal, when deciding on its own jurisdiction, *shall* apply the doctrine of assertion.[23]

The essence of the doctrine has been described by the Supreme Court in the following manner:

> the arbitral tribunal shall not, when deciding on its jurisdiction, assess the existence of the legal facts[24] that a claimant asserts are covered by a legal relationship within the scope of an arbitration agreement. When deciding on its jurisdiction, the arbitral tribunal shall assume the existence of these legal facts.[25]

This statement implies that, as long as the claimant bases its claim on legal facts covered by a legal relationship within the scope of the arbitration agreement, the doctrine of assertion will be applicable.[26] The claimant will then not have to prove the existence of the legal facts invoked in order for the arbitral tribunal to have jurisdiction. The arbitral tribunal shall grant itself jurisdiction solely on what the claimant has asserted.[27] Only later when the arbitral tribunal tries the case on the merits will it determine the existence of the alleged legal facts. Should the arbitral tribunal then find that the claimant has not been able to prove the existence of the legal facts invoked, it shall *reject* the claimant's claim on the merits in the final award (not dismiss it for lack of jurisdiction).

Even though the doctrine of assertion shall be applied as a main rule, there are three important exceptions[28] to the doctrine.[29] Hence, the arbitral tribunal shall not apply the doctrine if:

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23. *Petrobart* (NJA 2008 p. 406) at 416 and *The Set-Off Agreement* (NJA 2017 p. 226) at para. 10.
24. Legal facts, in Swedish *'rättsfakta'*, have a special meaning under Swedish law. They are the factual circumstances which, according to a rule of law, have *direct* bearing on the relief sought. This can be compared to so-called evidentiary facts, in Swedish *'bevisfakta'*, which are facts of *indirect* relevance for the relief sought in the sense that they can either prove or disprove the existence of the legal facts.
25. *Petrobart* (NJA 2008 p. 406 at 416). Cf. *The Set-Off Agreement* (NJA 2017 p. 226) at para. 10.
26. *The Set-Off Agreement* (NJA 2017 p. 226) at para. 10.
27. *See*, *e.g.*, Hobér, *supra* n. 6, at paras 3.33-3.35 and Lindskog, *supra* n. 14, at section I:0-6.1.2.
28. *See*, *e.g.*, Heuman, *Undantag från påståendedoktrinen och regeln att en skiljeklausul endast avser avtalet*, JT 2017/18, who uses the term 'exceptions'. However, the 'exceptions' could just as well be formulated as 'prerequisites' for the application of the doctrine. Thus, instead of listing the cases where the doctrine is *not* applicable, one could list the conditions for it to *be* applicable, i.e., that: (1) the claimant's claim is *not* manifestly unfounded, (2) it is *undisputed* whether a valid arbitration agreement exists between the parties, and (3) it is *undisputed* whether the arbitration agreement covers the legal relationship on which the claim is based. Cf. Lindskog, *supra* n. 14, at section I:0-6.1.2 note 783. In the authors' opinion, it is however of little practical relevance which terminology is used – the assessment will give the same conclusion no matter if the circumstances are treated as exceptions to, or prerequisites for, the application of the doctrine.
29. These exceptions are generally recognized in court practice and legal literature. It can be noted, however, that there have been discussions in the legal literature regarding further potential exceptions to the doctrine, *see* Heuman, *supra* n. 28, at 900-901.

(1) the claimant's claim is *manifestly unfounded*;[30]
(2) it is disputed whether there is a *valid* arbitration agreement between the parties;[31] or
(3) it is disputed whether the arbitration agreement *covers* the legal relationship on which the claim is based.[32]

In the type of multi-contract situations discussed here, it is usually the third exception to the doctrine of assertion that will become relevant. It follows from this exception that, if the parties disagree on the scope of the arbitration agreement (i.e., whether the arbitration clause in Contract 1 covers a claim based on Contract 2), the disagreement cannot be resolved by application of the doctrine of assertion. Instead, the arbitral tribunal has to move on to the next step in the jurisdictional assessment. The reasoning for this is that a party who has not entered into an arbitration agreement that covers the disputed legal relationship should not be forced into arbitral proceedings as a result of applying the doctrine.[33]

However, if the respondent does not object to the dispute being covered by the arbitration clause but only makes an objection regarding the merits of the claim (e.g., that Contact 2 does not have any bearing at all on the matter of the dispute and therefore the arbitral tribunal shall not have jurisdiction), then the doctrine of assertion becomes applicable.[34] When deciding on its jurisdiction, the arbitral tribunal shall then assume that the legal facts invoked by the claimant exist (e.g., that Contract 2 *does* have a bearing on the dispute) and should, consequently, decide that it has jurisdiction. Whether the claimant actually was right in its assertions will not be settled until the arbitral tribunal determines the case on the merits.

30. Cf., e.g., *Nykvarn* (NJA 1982 p. 738) at 741, *PLS Rambøll Management A/S v. A.S.* (NJA 2005 p. 586) at 593 and Svea Court of Appeal, judgment on 5 October 2012 in Case No. T 8399-11. *See* further Lars Welamson, *Recension av Per Olof Bolding. Skiljedom. Studier i rättspraxis beträffande svensk skiljedoms giltighet och verkställbarhet*, SvJT 1964, 278 et seq., Heuman, *supra* n. 6, at 57, and Patrik Schöldström, *Påståendedoktrinen och skiljeförfarande*, JT 2008/09, 140. For another view, *see* Lindskog, *supra* n. 14, at section I:0-6.1.2 note 782 as well as Lindskog's addendum to NJA 2008 p. 406 at 422 et seq.
31. *Petrobart* (NJA 2008 p. 406) at 416 et seq. and *The Set-Off Agreement* (NJA 2017 p. 226) at para. 10.
32. *Petrobart* (NJA 2008 p. 406) at 417 and *The Set-Off Agreement* (NJA 2017 p. 226) at para. 10. Cf. also the Svea Court of Appeal's judgment in *Belgor* at 178.
33. Cf. *Petrobart* (NJA 2008 p. 406) at 416 et seq.
34. It may be added that an arbitral tribunal is normally not obligated to try its jurisdiction *sua ponte* (independent of any motion by the parties), *see Elf Neftegaz v. Interneft OOO et al.* (NJA 2016 p. 264) at para. 11, Heuman, *supra* n. 6, at 340 and Lindskog, *supra* n. 14, at sections I:2-4.3.1 and 4.3.2, as well as sections IV:0-3.1.1 and 3.1.2. This means that if the respondent does not make any jurisdictional objection *at all*, the arbitral tribunal will usually have jurisdiction to try the dispute without having to make any closer jurisdictional assessment. In such a scenario, there is of course no need for the arbitral tribunal to apply the doctrine of assertion (or go through any of the other steps in the method).

[C] Step 2 – Agreement to Extend the Scope of the Arbitration Clause

> Have the parties agreed (explicitly or implicitly) that the arbitration clause in the main contract (Contract 1) shall also cover claims under the other contract (Contract 2)?

As pointed out in the previous section, the arbitral tribunal shall as a main rule apply the doctrine of assertion when determining whether it has jurisdiction over a particular claim. However, if the parties disagree on the scope of the arbitration clause, the doctrine of assertion cannot be applied by the arbitral tribunal to resolve the jurisdictional matter. Instead, the arbitral tribunal will then have to do a proper determination of whether the arbitration clause in Contract 1 covers claims based on Contract 2.

A claimant may invoke several grounds for its assertion that the claim under Contract 2 is covered by the arbitration clause in Contract 1. Step 2 becomes applicable if the claimant as one ground alleges that the parties have *agreed* to extend the scope of the arbitration clause to cover both Contract 1 and Contract 2. If the claimant can prove the existence of such an agreement, then the arbitral tribunal will have jurisdiction.[35] No closer examination is then required of whether Contract 1 and Contract 2 constitute the same legal relationship or two separate legal relationships; the parties' agreement will be sufficient for the arbitral tribunal to have jurisdiction.

The identification requirement will however still affect *the time* at which an agreement can be made to extend the scope of an arbitration clause in one contract to another contract. As mentioned in section 10.02[B], in order for a legal relationship to be identified with the sufficient level of precision in an arbitration agreement, the legal relationship *must have arisen at the time when the arbitration agreement is concluded*. This means that an agreement to extend the scope of an arbitration clause to a new contract may not, as a main rule, be entered into until that new contract has been formed.

There are no restrictions under Swedish law regarding the form of an arbitration agreement. Thus, an arbitration agreement – as well as an extension of an already-concluded arbitration agreement – may be concluded in writing, orally, by conduct or even through inaction/passivity under certain circumstances.[36] It is however usually difficult for the party that has the burden of proof to show that an arbitration agreement has been concluded without a written agreement of some sort.[37] Swedish courts have also often required a fairly high degree of certainty to establish the existence of an

35. In Sweden, the burden of proof for the existence of an agreement (including an arbitration agreement) is normally on the party relying upon the agreement, *see, e.g.*, Lars Heuman, *Bevisbörda och beviskrav i tvistemål* (Stockholm: Norstedts Juridik, 2005), 225 et seq. Cf. also the Svea Court of Appeal's judgment in *Belgor* and Svea Court of Appeal, judgment on 21 February 2007 in Case No. T 6762-05.
36. Government Bill 1998/99:35, 66 et seq. and Hobér, *supra* n. 6 at paras 3.05-3.30.
37. Cf. Hobér, *supra* n. 6, at paras 3.05 and 3.12.

arbitration agreement.[38] The safest way for parties to ensure that an arbitration clause in one contract will also cover disputes under another related contract would therefore be either to add a written addendum to the arbitration clause or to add a specific reference to the arbitration clause in the other contract.[39] The mere fact that one contract contains general references to the other contract would probably not be enough *in itself* to conclude that the parties have intended to incorporate the arbitration clause into both contracts. However, the question has not been clearly addressed in case law.[40]

It has been suggested by some commentators that, in certain multi-contract situations, the arbitration clause in one contract may be implied into future subcontracts once these are concluded. The authors of this chapter agree with this view. A typical situation could be that the parties are in a long-term business relationship regulated by a framework agreement containing an arbitration clause. Should the parties enter into ancillary contracts in the manner set out in the framework agreement, the parties may – by their conduct – be deemed to have agreed to extend the arbitration clause in the framework agreement to these ancillary contracts.[41]

As a final note, it should be stressed that an arbitral tribunal may only determine whether the parties have entered into an agreement to extend the scope of an arbitration clause if this has been *invoked as a legal fact* by either party.[42] If not, the arbitral tribunal must skip this step of the method. The reason for this is that under Swedish law an arbitral tribunal (or court for that matter) may only base an award on legal facts invoked by the parties. If the arbitral tribunal has determined its jurisdiction based on a legal fact that has not been invoked by the right party, the arbitral tribunal will have exceeded its mandate and the award may be set aside.[43]

[D] Step 3 – The Same Legal Relationship

> Do the main contract (Contract 1) and the other contract (Contract 2) constitute the same legal relationship with the result that the arbitration clause in the main contract also covers claims under the other contract?

38. *See*, *e.g.*, RH 1980:48, RH 1982:102, RH 1995:123, and Svea Court of Appeal, judgment on 25 May 2004 in Case No. 1361-02 (p. 18). Cf. also *R. Urhelyi v. Arbetsmarknadens försäkringsaktiebolag* (NJA 1974 p. 573) at 583 where the Supreme Court concluded that a dispute resolution mechanism in a contract between an employee and an insurance company did not 'unequivocally express' that the parties' intention was to resolve disputes in arbitration. *See further* Lindskog, *supra* n. 14, at section I:0-2.1.3. However, as has been pointed out by, e.g., Hobér, *supra* n. 6, at para. 3.04, there is no *express* support in case law that stricter requirements shall apply with respect to entering into arbitration agreements compared to other agreements.
39. Cf. Lars Heuman, *Bevisbördan för skiljeavtal och tolkningsresonemang som grund för skiljebundenhet*, JT 2011/12, 672.
40. However, cf. the Svea Court of Appeal's judgment in *Belgor*, at 179. Cf. also *DHL Express (Sweden) AB v. The Bankruptcy Estate of Nordic Logistic Service Oy* (NJA 2005 Note N 8).
41. *See* Lindskog, *supra* n. 14, at section I:1-5.1.3, notes 1055, 1060 and 1062, and section I:1-5.2.3 *in fine* with note 1097, and Andersson et al., *supra* n. 16, at 44 and 52 et seq.
42. For the meaning of legal fact under Swedish law, *see supra* n. 24.
43. Government Bill 1998/99:35, 143 et seq. and Hobér, *supra* n. 6, at para. 8.79.

In addition to arguing that the parties have reached an agreement to extend the scope of the arbitration clause to cover both Contract 1 and Contract 2, the claimant may also argue that the claim under Contract 2 is covered by the arbitration clause in Contract 1 since the two contracts constitute the *same legal relationship*. The arbitral tribunal will have jurisdiction under this step if it finds that the legal facts invoked by the claimant in support of its claim under Contract 2 are based on the legal relationship identified in the arbitration clause in Contract 1.[44]

As long as Contract 1 and Contract 2 constitute the same legal relationship, the identification requirement will not pose any obstacle for the arbitral tribunal. This is because, in such a case, the claimant's claim under Contract 2 will be based on the legal relationship identified in the arbitration clause in Contract 1, and thus the identification requirement will be met. As discussed in section 10.02[A], it shall as a starting point be assumed that an arbitration clause covers the entire legal relationship identified therein. For the application of this starting point, it does not matter whether the legal relationship is regulated in only one or several contractual documents.

The term 'legal relationship' shall be given a wide interpretation. The Supreme Court has clarified that it covers not only those rights and obligations that have been set forth in the original contract but also subsequent legal facts that alter the content of the contract.[45] Conversely, if the subsequent legal facts (e.g., a new contract) do not only alter or modify the content of the original contract but also establish a completely new and independent relationship between the parties, a separate legal relationship will be formed.

In order to demonstrate the above, commentators have often used as an example the situation where two parties first enter into a main agreement which includes an arbitration clause and then, after some time, enter into a side agreement or an additional agreement. The arbitration clause will cover the side or additional agreement if the agreements have such a strong connection that the subsequent agreement can be said to form a part of the main agreement.[46] However, the subsequent agreement will be deemed a separate legal relationship if it constitutes a complete alteration of, or a significant addition to, the main agreement.[47]

In practice, the assessment will have to consider all the factual circumstances in the case at hand. However, the following circumstances might be of particular interest for the arbitral tribunal.

First, the arbitral tribunal may assess the content of the two contracts to see if there is a substantive connection between them and if they overlap in any way. The

44. This is of course assuming that the scope of the arbitration clause has not been limited to only certain disputes and/or only part of the legal relationship, *see* section 10.02[A] *supra*.
45. *The Set-Off Agreement* (NJA 2017 p. 226) para. 14, and *Belgor* para. 15. In *Belgor*, the Supreme Court has confirmed this further by stating that an arbitration agreement, as well as the term 'legal relationship', shall be interpreted generously. *See* further section 10.04[A] *infra*.
46. *See* Lindskog, *supra* n. 14, section I:1-5.2.3 with notes, and Thorsten Cars, *Lag (1999:116) om skiljeförfarande, 1 §* (Lexino, last updated 2 November 2020), section 2.2.5. Cf. also similar statements in RH 2012:13 and Svea Court of Appeal, judgment on 10 May 2012 in Case No. T 10329-10.
47. *See* Heuman, *supra* n. 39, at 672.

closer the substantive connection and the greater the overlap, the more likely it is that the two contracts shall be deemed to constitute the same legal relationship.[48]

Second, the arbitral tribunal may look to particular phrases in the contracts that may give a clue as to how the parties themselves view the second contract in relation to the first contract. For example, if it is stated in the second contract that it forms an integral part of the first contract, this indicates that the contracts should be viewed as parts of the same legal relationship.[49] This might also be the case if the first contract contains references to the second contract and vice versa.[50] Conversely, if the first contract explicitly states that a certain question will be regulated in a separate contract, and the parties thereafter go on to regulate this question separately, then it is likely that the separate contract will be regarded as a new legal relationship in relation to the first contract.[51]

Third, the arbitral tribunal may pay attention to whether both contracts contain arbitration clauses or if the contracts contain different dispute resolution mechanisms. If both contracts contain an identical arbitration clause, this may – together with other surrounding circumstances – be seen as an indication that the contracts are part of the same legal relationship.[52] However, if the contracts contain different arbitration clauses, or different dispute resolution mechanisms altogether, this might be a reason for treating the contracts as two separate legal relationships.[53]

However, one circumstance that seems to be of little or no relevance when determining whether two contracts constitute the same legal relationship is the standard wording of the arbitration clause. For example, an arbitration clause stating that 'Any disputes arising out of or in connection with *this contract* shall be finally settled by arbitration' will not be limited to disputes under that particular contract but will also cover disputes under other related contracts as long as these contracts constitute the same legal relationship (emphasis added).[54] If the parties wish to limit

48. *See, e.g.*, AD 2012 No. 20 (an employment contract and an oral agreement concluded prior to the employment contract constituted the same legal relationship), *DHL Express (Sweden) AB v. The Bankruptcy Estate of Nordic Logistic Service Oy* (NJA 2005 Note N 8) (a cooperation agreement and some standard agreements did not constitute the same legal relationship), and Svea Court of Appeal, decision on 21 November 1995 in Case No. Ö 3156-95 (a cooperation agreement and some purchase agreements did not constitute the same legal relationship). *See also* Heuman, *supra* n. 39, at 674 et seq. and Andersson et al., *supra* n. 16, at 51.
49. Lars Heuman, *Specialprocess,* 8th ed. (Stockholm: Norstedts Juridik, 2020), 30.
50. Cf. *C.A. Lundborg v. K.I. Gustafsson* (NJA 1922 p. 37), Svea Court of Appeal, judgment on 10 May 2012 in Case No. T 10329-10 and Göta Court of Appeal, judgment on 8 December 2015 in Case No. T 573-15.
51. Svea Court of Appeal, judgment on 21 February 2007 in Case No. T 6762-05 and Court of Appeal for Western Sweden, decision on 29 October 1996 in Case No. Ö 1789-95. Cf. also Heuman, *supra* n. 39, at 673-674.
52. Cf. Svea Court of Appeal, judgment on 21 February 2007 in Case No. T 6762-05.
53. Cf. Heuman, *supra* n. 6, at 71, and Lindskog, *supra* n. 14, at section I:1-5.2.3, note 1091. However, cf. also *Belgor* and Court of Appeal for Western Sweden, decision on 10 February 2005 in Case No. Ö 4204-04.
54. This follows indirectly from, e.g., *J. Larsson v. AB nya järnhandeln i Sandviken* (NJA 1919 p. 497) where the Supreme Court found that an arbitration clause concerning 'disputes regarding the correct interpretation of *the contract*' also covered a dispute under a side agreement to that contract (emphasis added).

the scope of an arbitration clause to only a part of the legal relationship, this has to be clearly indicated in the language of the arbitration clause and/or by other surrounding circumstances.[55]

The above list of circumstances is in no way conclusive but may provide some assistance to an arbitral tribunal when making an assessment under this step.

[E] Step 4 – The Doctrine of Connection

> Is the connection between the two contracts so strong – and the circumstances so special – that it motivates the extension of the arbitration clause in the main contract (Contract 1) to claims under the other contract (Contract 2)?

If the arbitral tribunal concludes under step 3 that Contract 1 and Contract 2 constitute two separate legal relationships, the arbitral tribunal will, as a main rule, *not* have jurisdiction over a claim under Contract 2.[56]

However, in a number of judgments, the Supreme Court has developed a doctrine that is often referred to in the legal literature as the *doctrine of connection* (Sw. *anknytningsdoktrinen*). According to this doctrine, an arbitral tribunal may have jurisdiction over a dispute as long as there is a sufficiently strong connection between the legal relationship identified in the arbitration clause and the legal facts invoked by the claimant, even if these legal facts are based on another legal relationship.

There are several cases where the Supreme Court seems to have applied some variation of the doctrine of connection.[57] The case that perhaps first and foremost has come to represent the doctrine is *The Road Material* (NJA 2007 p. 745). In this case, the Supreme Court found that a ground outside a contractual relationship fell within the scope of the applicable arbitration clause since there was a 'direct connection' between the non-contractual ground and the other two grounds relied upon. Due to this direct connection, and the fact that the two other grounds were based on the legal relationship identified in the arbitration clause, the arbitration agreement was extended to the third ground – despite the fact that it was based on another legal relationship.[58] In a later judgment, *Ystad Harbour* (NJA 2008 p. 120), the Supreme Court also found that a non-contractual ground was covered by an arbitration clause by emphasizing that the claimant's request, which was based on the non-contractual ground, had such a 'strong

55. Cf. section 10.02[A] *supra*.
56. *See* section 10.02[A] *supra*.
57. *Hans Schröder AB v. Svenska AB Lebam* (NJA 1964 p. 2), *Byggnadsaktiebolaget Lennart Hultenberger v. Bostadsrättsföreningen Hytten* (NJA 1972 p. 458), AD 1976 No. 54, *The Road Material* (NJA 2007 p. 745) and *Ystad Harbour* (NJA 2008 p. 120). Cf. also *B. Arvold v. Kjellbergs Successors AB* (NJA 1973 p. 620). In addition, it shall be mentioned that there are a number of older court cases where the courts could have chosen to apply the doctrine of connection but chose not to do so, *see, e.g.*, *Nykvarn* (NJA 1982 p. 738), RH 1985:90, RH 1991:16 and RH 1994:45.
58. *The Road Material* (NJA 2007 p. 475) at 478.

connection' to the contractual relationship that it was covered by the arbitration clause.[59]

In two later judgments, *Tupperware* (NJA 2010 p. 734) and *The Set-Off Agreement* (NJA 2017 p. 226), the Supreme Court has however (partly in obiter dicta) narrowed the scope of the doctrine of connection. Both cases dealt with the question of whether an arbitration clause could be interpreted as covering a ground based on another legal relationship than the legal relationship identified in the arbitration clause, and in both cases the question was answered in the negative.[60] According to the Supreme Court in these cases, the fact that there is a connection between the legal relationship which is covered by an arbitration clause and another disputed legal relationship may only 'in some exceptional cases and under very special circumstances' extend the arbitration clause to cover also the disputed legal relationship.[61]

The Supreme Court has given no further guidance as to when the circumstances would be special enough to motivate an application of the doctrine of connection. What seems clear though is that the doctrine may be applied in situations similar to that in *The Road Material*,[62] i.e., where one party invokes several contractual grounds that are covered by the arbitration clause as well as one additional ground (which either may be non-contractual or based on a separate contractual legal relationship) and where there is a direct or strong connection between the contractual grounds and the additional ground.

In light of this development, the authors' view is that the doctrine of connection may today only be applied if:

(1) there is a sufficiently strong connection between the legal facts invoked by the claimant and the legal relationship identified in the arbitration clause; *and*
(2) it is an exceptional situation where the circumstances are very special, which, for example, may be the case where one party invokes several contractual grounds that are covered by the arbitration clause as well as one additional ground which is based on factual circumstances with a strong or direct connection to the agreement containing the arbitration clause.[63]

As a result of the second point mentioned immediately above, an arbitral tribunal will only rather seldom find that it has jurisdiction under this step 4. The fact that there is a strong or direct connection between Contract 1 and Contract 2 is thus not in itself enough for the arbitration clause to extend to both contracts if it has been concluded under step 3 that Contract 1 and Contract 2 constitute two separate legal relationships.

59. *Ystad Harbour* (NJA 2008 p. 120) at 216.
60. *Tupperware* (NJA 2010 p. 734) actually concerned the scope of a prorogation clause, but the Supreme Court in obiter dicta broadened the scope of all its conclusions to apply also to arbitration clauses.
61. *Tupperware* (NJA 2010 p. 734) at para. 14 and *The Set-Off Agreement* (NJA 2017 p. 226) at para. 12.
62. Cf. *Tupperware* (NJA 2010 p. 734) at para. 14.
63. *See* further Wendleby, *supra* n. 4, at 154-156.

Some commentators have suggested that the Supreme Court in *Belgor* has yet again widened the scope of the doctrine of connection by limiting the importance of the identification requirement. In their opinion, *Belgor* has likely overruled *Tupperware* and *The Set-Off Agreement*.[64] As will be developed in the next section, the authors of this chapter do not believe that it is possible to draw such far-reaching conclusions from *Belgor*. Until the Supreme Court clearly addresses the issue, one should assume that earlier precedents are still valid.

§10.04 THE BELGOR CASE AND ITS IMPLICATIONS FOR THE PROPOSED METHOD

[A] The *Belgor* Case

[1] Background

Belgor has already caused quite a stir among legal scholars and practitioners in the field of Swedish arbitration.[65] In the part of the judgment that has received the most attention, the Supreme Court made some new statements regarding the proper determination of the scope of an arbitration clause. Following a brief introduction to the case and the Supreme Court's judgment, this section addresses *Belgor*'s possible implications on the method presented above.

The *Belgor* case has its origin in a dispute between the Turkish company Koca and the Belarussian company Belgor. In 2010, Belgor, as general contractor, initiated a tender for a project relating to the construction of a mining and processing plant in Turkmenistan. Koca won the tender. In January 2011, the parties entered into a construction contract relating *inter alia* to the construction and sinking of two mining shafts on the construction site (the Construction Contract).[66] The Construction Contract contained an arbitration clause referring all disputes 'emerged because of or in connection with' the Construction Contract to arbitration under the SCC Rules.

In November 2012, the Construction Contract was terminated by Belgor on the ground that Koca had produced defective works. Koca contested the termination, and in February 2013, Koca filed a request for arbitration with the SCC, requesting payment for, e.g., works performed under the Construction Contract as well as for some

64. *See* Madsen, *supra* n. 21, at 87 et seq. and 94, and Reldén and Frank, *supra* n. 21, at 74-77 and 82.
65. *See* Christer Danielsson, *Swedish Arbitration-Related Case Law 2017–2019* in *Stockholm Arbitration Yearbook 2019* (The Netherlands: Wolters Kluwer International, 2019), Patrik Schöldström, *Har Belgor förändrat prövningen av en skiljenämnds behörighet och handläggningsfel?*, JT 2019/20, 222, Heuman, *supra* n. 21 and 49, Reldén and Frank, *supra* n. 21, Madsen, *supra* n. 21, and Lindskog, *supra* n. 14, at sections 0:2.2.8 with note 76, I:1-5.1.2 note 1049, I:1-5.2.4 note 1100, I:2-5.2.3, V:34-4.1.1 note 3677, and IX:54-5.2.3 with note 4915.
66. There was also a third party to the Construction Contract responsible for technical support and supervision of the construction project.

additional works that Koca had performed on the basis of five separate contracts (the Additional Works).[67]

In its final award in April 2015, the arbitral tribunal ruled in favour of Koca (albeit not in full) and ordered Belgor to compensate Koca for *inter alia* the Additional Works. Belgor challenged the award and requested that it be set aside in its entirety or at least in part. As one of the grounds for setting aside the award, Belgor maintained that the arbitral tribunal lacked jurisdiction to resolve claims in respect of the Additional Works as they fell outside the scope of the arbitration clause in the Construction Contract.

[2] The Arbitral Tribunal's Assessment of Its Jurisdiction

The arbitral tribunal found that it had jurisdiction to try the claims concerning the Additional Works based on the following reasoning.[68]

According to the arbitral tribunal, the Construction Contract did not *directly* refer to the Additional Works, and thus disputes concerning the Additional Works could not be said to 'arise out of the [Construction] Contract'. The arbitral tribunal noted however that it was undisputed between the parties that: (1) the Additional Works were ordered after the termination of the Construction Contract and while the parties were trying to agree on the terms and conditions for the termination of the Construction Contract,[69] and (2) the Additional Works related to the construction and sinking of the shafts (i.e., to the subject matter of the Construction Contract). For these reasons, and particularly in light of the fact that the Additional Works were ordered and performed while the parties were negotiating the consequences of the termination of the Construction Contract, the arbitral tribunal found that the Additional Works had been performed 'in connection with' the Construction Contract, 'indeed within the contractual framework between the Parties established by the [Construction] Contract'. Claims concerning the Additional Works therefore fell within the scope of the arbitration clause in the Construction Contract.

The arbitral tribunal then went on to note that the Additional Works had been performed under five separate contracts, which did not have arbitration clauses, but which stipulated that the parties had a right (but not an obligation) to refer disputes to the Economic Court in Minsk. However, according to the arbitral tribunal, the prorogation clauses in the separate contracts did not displace the arbitration clause in the Construction Contract. Thus, even though the Construction Contract and the Additional Works contained different dispute resolution mechanisms, the arbitration

67. In the award (para. 84), the arbitral tribunal stated that it was 'undisputed' between the parties that the Additional Works had been performed under five separate contracts. This was however later on denied by Koca in the challenge proceeding where Koca claimed that the parties had never entered into any written, separate agreements in respect of the Additional Works, *see* Koca's submission to the Supreme Court on 21 September 2018, file appendix 37, para. 2.1.5.
68. *See* paras 79-86 of the award.
69. This was also later on denied by Koca in the challenge proceeding where Koca argued that the Additional Works had been ordered and carried out *before* the termination of the Construction Contract. *See* Koca's submission to the Supreme Court on 21 September 2018, file appendix 37, para. 2.1.6.

clause in the Construction Contract could still be applied to disputes concerning the Additional Works.

[3] The Case Before the Supreme Court

Belgor's challenge action was examined by the Svea Court of Appeal as the first instance. Contrary to the arbitral tribunal, the court made the assessment that the arbitration clause in the Construction Contract did not cover the dispute concerning the Additional Works.[70] For this reason, the award was partially set aside.[71]

Koca appealed to the Supreme Court and argued, in summary, that the Additional Works were covered by the arbitration clause in the Construction Contract since: (1) it followed explicitly from the Construction Contract that the arbitration clause also encompassed the Additional Works (cf. step 2 of our proposed method), and (2) the Construction Contract and the Additional Works constituted the same legal relationship (cf. step 3 of the proposed method).[72] Koca did not claim that the doctrine of connection was to be applied (cf. step 4 of the proposed method).[73]

Belgor contested Koca's claims and maintained that the arbitration clause in the Construction Contract did not cover the Additional Works since: (1) the parties had not agreed to extend the scope of the arbitration clause in the Construction Contract to cover disputes concerning the Additional Works, and (2) the Additional Works had been performed under five separate contracts which constituted other legal relationships than the legal relationship identified in the arbitration clause in the Construction Contract.[74]

The Supreme Court ruled in Koca's favour and concluded that there was no reason to reject the arbitral tribunal's determination of its jurisdiction. The Supreme Court reached this conclusion by first laying out some legal starting points (Sw. *rättsliga utgångspunkter*) and then applying these to the current case.[75] As regards the legal starting points, the following should be mentioned in particular:

- The Supreme Court started off by referring to the identification requirement under section 1 of the SAA, reiterating that an arbitration agreement has to pertain to a specific legal relationship.
- The Supreme Court thereafter went on to establish the second 'starting point' described under section 2.1 *in fine*, regarding the interpretation of the scope of an arbitration clause, stressing that in a case where it is not possible to

70. For a brief summary of the Svea Court of Appeal's judgment in English, *see* Reldén and Frank, *supra* n. 21, at 69 et seq.
71. The Svea Court of Appeal also found that there was one additional ground for partially setting aside the award, which, however, will not be discussed here.
72. Koca's submission to the Supreme Court on 15 June 2018, file appendix 30, section 3, and Koca's submission to the Supreme Court on 21 September 2018, file appendix 37, section 2. *See also* legal opinion by legal scholar Marcus Radetzki submitted by Koca, file appendix 39.
73. Cf. Koca's submission to the Supreme Court on 21 September 2018, file appendix 37, section 2.
74. Belgor's submission to the Supreme Court on 21 September 2018, file appendix 40, section C.1.
75. *Belgor* paras 12-24.

determine a common intention of the parties – and where neither the wording nor other surrounding circumstances give any guidance – it shall be assumed that the parties have intended to resolve all their disputes swiftly and in one cohesive proceeding before an arbitral tribunal appointed by them.
- With reference to the underlying principles of the 1958 New York Convention, the Supreme Court then emphasized that arbitration agreements and the term 'legal relationship' shall be given a generous interpretation. The Supreme Court also reiterated that a legal relationship may cover more than those rights and obligations that have been set forth in an original agreement.
- Lastly, the Supreme Court stated that when a court in a challenge proceeding is tasked with reviewing the arbitral tribunal's decision on its jurisdiction, the court shall pay regard to the fact that the arbitral tribunal typically is best positioned to determine the issue of its own jurisdiction. A starting point should therefore be that the arbitral tribunal's interpretation and evaluation of evidence is correct.

Based on these starting points, the Supreme Court stated that, in a challenge proceeding, it shall be reviewed whether the party contesting jurisdiction has shown that the arbitral tribunal has made an incorrect assessment of the scope of the arbitration agreement. The Supreme Court then went on to summarize the arbitral tribunal's assessment of whether the Additional Works were covered by the arbitration clause in the Construction Contract. The Supreme Court concluded that what Belgor had asserted in the challenge proceeding did not constitute grounds for rejecting the arbitral tribunal's assessment.

[B] Discussion

In *Belgor*, the Supreme Court upheld the arbitral tribunal's determination of its own jurisdiction. Some commentators have argued that the Supreme Court by doing so widened the scope of the doctrine of connection and relaxed the identification requirement. They seem to arrive at this conclusion by putting emphasis on the fact that the arbitral tribunal in its decision stated that the Additional Works could not be said to 'arise out of' the Construction Contract but had been performed 'in connection with' the Construction Contract. According to these commentators, this shows that the arbitral tribunal determined that the Construction Contract and the Additional Works constituted separate legal relationships (cf. step 3 of our proposed method) but nevertheless gave itself jurisdiction by applying the doctrine of connection (cf. step 4 of the proposed method).[76]

In the authors' opinion, it is difficult to draw such far-reaching conclusions from the arbitral tribunal's decision. The arbitral tribunal did not refer to any Swedish case

76. Cf., e.g., Reldén and Frank, *supra* n. 21, at 68 et seq. It is worth mentioning that this was also one of Belgor's arguments in the proceeding before the Supreme Court, *see*, *e.g.*, Belgor's submission on 16 March 2018, file appendix 24, section A.1, and Belgor's submission on 28 September 2018, file appendix 47, para. 6.

law and it is unclear which meaning the arbitral tribunal gave to the words 'in connection with'. Having concluded that the Additional Works had been performed in connection with the Construction Contract, the arbitral tribunal added however that this indeed meant that the Additional Works had been performed 'within the contractual framework' established by the Construction Contract. This additional finding by the arbitral tribunal does not suggest that the arbitral tribunal concluded that the Additional Works constituted separate legal relationships. Rather, it implies that the arbitral tribunal considered the Additional Works to constitute part of the legal relationship that had been established by the Construction Contract.

Interestingly, it is only the addition ('within the contractual framework … ') which is quoted by the Supreme Court in *Belgor*. In fact, this is the *only* direct quote from the arbitral tribunal's decision included in this part of the Supreme Court's judgment.[77] This indicates that the Supreme Court attached great significance to this particular finding by the arbitral tribunal. Thus, it is possible that the Supreme Court interpreted the arbitral tribunal's assessment on the basis that the arbitral tribunal *did not* apply the doctrine of connection, but rather confirmed its jurisdiction by concluding that the arbitration clause in the Construction Contract covered the Additional Works as they constituted part of the same legal relationship.[78]

This conclusion does not seem unreasonable.[79] A construction contract and additional contracts to such a contract may very well be regarded as the same legal relationship depending on the circumstances in the given case.[80] The arbitration clause in the Construction Contract would then be assumed to cover the entire legal relationship, i.e., also the additional contracts.[81]

If the Supreme Court intended to limit the importance of the identification requirement in *Belgor*, one may also ask why the Supreme Court did not make its intention clear. After all, it had plenty of opportunities to do so. For example, the Supreme Court began the legal starting points by referring to the identification requirement, reiterating that an arbitration agreement has to pertain to a specific legal relationship, but made no statement indicating a limitation of the requirement. Also, in the legal starting points, the Supreme Court discussed the scope of the term 'legal relationship', emphasizing *inter alia* that it should be given a generous interpretation

77. *Belgor* para. 22.
78. On this note it should be stressed that not even Koca argued before the Supreme Court that the arbitral tribunal had applied the doctrine of connection or that the doctrine should be applied in the case, *see* section 10.04[A][3].
79. It should be mentioned that the Svea Court of Appeal found that the Construction Contract and the Additional Works did not constitute the same legal relationship, *see Belgor* at 179 et seq. However, the Court of Appeal arrived at this conclusion partly due to the fact that it could not make a more comprehensive assessment of the connection between the Construction Contract and the Additional Works since Koca had not presented any further investigation into this question. In the proceeding before the Supreme Court, Koca did however make a thorough presentation of the connection between said contracts, *see*, *e.g.*, Belgor's submission on 15 June 2018, file appendix 30, sections 3.2-3.4. It is possible that if this investigation had been presented already to the Svea Court of Appeal, the court would have deemed that the Construction Contract and the Additional Works constituted the same legal relationship.
80. Cf., e.g., Lindskog, *supra* n. 14, at I:1-5.2.3 note 1095, and Heuman, *supra* n. 39 at 675.
81. *See* section 10.02[A] *supra*.

and not only cover those rights and obligations that have been set forth in an original agreement. These statements would seem irrelevant if the court actually sought to limit the importance of the identification requirement, but on the other hand they make perfect sense if the court intended to confirm that the term 'legal relationship' shall be given a wide application.

Further, it has been suggested that the Supreme Court, by making references to *Tupperware* and *The Set-Off Agreement* in *Belgor* without stating explicitly that it follows from these cases that the doctrine of connection may only be applied under exceptional circumstances, has made it clear that these statements should no longer be guiding and authoritative when determining the scope of an arbitration agreement.[82] However, in the authors' view, one should be careful about interpreting the Supreme Court's silence on a particular matter as if previous precedents regarding that matter have been overruled. One shall have in mind that there might have been reasons why the Supreme Court did not consider it relevant to delve into previous precedents regarding the application of the doctrine of connection in *Belgor*. For instance, if the Supreme Court interpreted the arbitral tribunal's assessment on the basis that it did not apply the doctrine of connection (and if the Supreme Court had no intention to apply the doctrine itself), there would be no need for the Supreme Court to discuss it further under its discussion of the legal starting points.

However, there are several important new points that may be deduced from *Belgor*.

First, in *Belgor*, the Supreme Court has made it even clearer that arbitration agreements (to the extent allowed for by the identification requirement) shall be interpreted extensively. *Belgor* shows that the assumptions that: (1) an arbitration clause covers the entire legal relationship identified therein and (2) parties intend to have all their disputes settled in one single forum are very strong.[83] Thus, even in a situation where the underlying contracts contain completely different (albeit voluntary) dispute resolution mechanisms than the main contract containing an arbitration clause, this is not enough in itself to determine a clear intention of the parties to limit the scope of the arbitration clause to only cover the main contract. [84] Thus, the parties need to be even more explicit if they wish to limit the scope of an arbitration clause to only some disputes or to only a part of the legal relationship.

Second, and perhaps most importantly, *Belgor* has introduced the idea that the 'starting point' for a court's determination of an arbitral tribunal's jurisdiction shall be that the arbitral tribunal's interpretation and evaluation of evidence is correct since it is typically the arbitral tribunal that is best positioned to determine the issue of its own jurisdiction. Therefore, the party contesting jurisdiction will have to show that the arbitral tribunal's assessment of the scope of the arbitration agreement was incorrect.

82. Cf. Reldén and Frank, *supra* n. 21, at 76, and Heuman, *supra* n. 21, at 546-547.
83. Cf. section 10.02[A].
84. This has been criticized by, e.g., Schöldström, *supra* n. 65, at 245 and 247.

The Supreme Court's statements in this respect are in line with previous statements made in cases regarding the enforcement of foreign arbitral awards.[85] Through *Belgor*, these statements now seem to have been extended from enforcement proceedings to challenge proceedings as well. Moreover, the Supreme Court's statements correspond well to the more general notion that the emphasis of the administration of justice should be on the first instance (which, if the notion were to be applied to arbitral proceedings, would be the arbitral tribunal) and that the task of the appellate courts above all shall be to review decisions and correct any errors.[86]

It is difficult to predict the practical implications of the Supreme Court's statements. In the authors' view, *Belgor* is likely to result in a higher threshold for setting aside arbitral awards in the future on the ground that the arbitral tribunal has exceeded its jurisdiction.[87] It should however be stressed that, at least in the authors' opinion, *Belgor* does not mean that a court in a challenge proceeding should completely refrain from making its own interpretation and evaluation of evidence. The court still has to ascertain that the arbitral tribunal's conclusions are based on an acceptable analysis.[88]

However, the core of the principle established through *Belgor* seems to be that when the question of the arbitral tribunal's jurisdiction boils down to an *interpretation and evaluation of evidence*, the starting point for the court's assessment is that the tribunal's interpretation and evaluation of evidence is correct. In practice, questions regarding an arbitral tribunal's jurisdiction often come down to interpretation and evaluation of evidence. This is, for example, the case when the question for the arbitral tribunal is whether the parties have agreed that claims under a second contract shall be covered by the arbitration clause in the first contract (cf. step 2 *supra*) or whether several contracts constitute the same legal relationship or, in the terms used by the arbitral tribunal in *Belgor*, fall within the same contractual framework (cf. step 3 *supra*).

§10.05 CONCLUDING REMARKS

This chapter has explored the different steps that may be included in an arbitral tribunal's assessment of its own jurisdiction in multi-contract situations where the parties have entered into one contract containing an arbitration clause, but where the dispute relates – in whole or in part – to another contract between the parties. It is important to stress that a mere assertion from the claimant that a claim under one contract is covered by the arbitration clause in another contract is not enough for the arbitral tribunal to have jurisdiction if this fact is disputed by the respondent (cf. step

85. *Fruits et Légumes* (NJA 2003 p. 379) and *Carbaque International Aktiebolag v. Fabryka Wyrobó* (NJA 2009 Note N 9).
86. Cf. Government Bill 2004/05:131, 82, Government Bill 1998/99:35, 170 et seq., and Government Bill 2017/18:257, 17.
87. However, it is worth mentioning that even before *Belgor* it was very rare that courts set aside arbitral awards, *see, e.g.*, Swedish Governmental Official Report SOU 2015:37, 79-81.
88. This also seems to be the way that the appellate courts at least so far have interpreted *Belgor*, *see, e.g.*, Svea Court of Appeal, judgment on 19 December 2019 in Case No. 7929-17 and Svea Court of Appeal, judgment on 10 June 2019 in Case No. T 4155-19.

1 of the proposed method). Likewise, a strong connection between the contracts is not enough in itself for the arbitral tribunal to have jurisdiction over disputes based on both of them (cf. step 4 of the proposed method). Usually, in order for the arbitral tribunal to have jurisdiction, the parties must have agreed to extend the scope of the arbitration clause to both contracts (cf. step 2 of the proposed method) or the two contracts must constitute the same legal relationship (cf. step 3 of the proposed method).

In the authors' opinion, through *Belgor*, the Supreme Court has provided arbitral tribunals with two important starting points when assessing its jurisdiction, namely that: (1) an arbitration clause generally covers the entire legal relationship identified therein and (2) parties generally intend to have all their disputes settled in one single forum. The Supreme Court has also provided Swedish courts with an important starting point when examining arbitral tribunal's assessment of its jurisdiction, namely that the starting point for the court is that the arbitral tribunal's interpretation and evaluation of evidence is correct since it is typically the arbitral tribunal that is best positioned to determine the issue of its own jurisdiction.

In the authors' opinion, it is too early to conclude that the Supreme Court in *Belgor* has also limited the importance of the identification requirement and rejected previous precedents regarding the scope of the application of the doctrine of connection. Although the authors personally would have favoured such a development, it is not clear that it was actually achieved through *Belgor*.