CHAPTER 1

Swedish Arbitration-Related Case Law 2021–2022

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§1.01 INTRODUCTION

This chapter will account for court cases relevant to arbitration law from the Swedish Supreme Court and Swedish appellate courts for the period 1 May 2021–30 April 2022. It does not purport to be exhaustive; the aim is to highlight cases that can be assumed to be of interest to a non-Swedish reader.

§1.02 BACKGROUND

The Swedish Arbitration Act of 1999[1] (the 'Act') applies to all arbitration proceedings seated in Sweden, whether the parties have any connection to Sweden or not.[2] The Act also sets out the requirements for foreign arbitral awards to be recognized and enforced in Sweden.[3]

Sweden has a three-tier court system: district courts, six regional appellate courts and the Supreme Court. However, district courts are only rarely involved in arbitration cases since the appellate courts are *Court of First Instance* for invalidity and set aside cases as well as for enforcement cases.

A Swedish arbitral award can be *declared invalid* if it determines an issue which under Swedish law cannot be decided by arbitrators or if the award, or the manner in

1. Lagen (1999:116) om skiljeförfarande, as amended 1 March 2019.
2. The Act, s. 46.
3. The Act, ss 52 et seq.

which it came about is clearly incompatible with the basic principles of the Swedish legal system, i.e., *ordre public*.[4]

An arbitral award can be *set aside* (wholly or partially) at the request of a party, *inter alia*, when the arbitrators have exceeded their mandate and when, without fault of the party, an irregularity has occurred in the course of the proceedings which probably influenced the outcome of the case.[5]

An action to invalidate or set aside an arbitration award shall be considered by the Court of Appeal within whose district the arbitral proceedings were seated.[6] The Court of Appeal's permission is required in order to appeal its judgment.[7] Such leave to appeal is denied in the large majority of cases. For the case to be tried by the Supreme Court, leave is also required from that court.[8]

Historically, invalidity and set aside actions have very rarely been successful. A statistical survey for the period 1 January 2004–31 May 2014 shows that seven arbitral awards were set aside pursuant to section 34 of the Act while one award was declared invalid pursuant to section 33 of the Act, equal to 6% of all decided cases.[9]

In the period covered by this chapter, one award was set aside in its entirety and one partially. No award was declared invalid.

§1.03 *REPUBLIC OF POLAND v. PL HOLDINGS S.A.R.L.*

[A] Introduction

As reported in the 2019, 2020 and 2021 Stockholm Arbitration Yearbook,[10] the Svea Court of Appeal in February 2019 rendered a judgment in a case similar to *Achmea*,[11] the *Republic of Poland v. PL Holdings S.a.r.l.* ('PL Holdings').[12] The Court of Appeal's judgment was appealed to the Supreme Court. The Supreme Court granted leave. On 4 February 2020, the Supreme Court decided to request a preliminary ruling from the Court of Justice of the European Union (CJEU). On 26 October 2021, the Grand Chamber of the CJEU handed down its award.

4. The Act, s. 33. In addition, under this provision an award is invalid if it does not fulfil the Act's requirements with regard to written form and signature.
5. The Act, s. 34(1), items 3 and 7. Section 34 provides for five other grounds for setting aside an arbitral award, but the two mentioned are those most frequently invoked in set aside proceedings.
6. The Act, s. 43(1). The large majority of invalidity and set aside proceedings are brought before the Svea Court of Appeal. The reason for this is that most Swedish arbitrations are seated in Stockholm.
7. The Act, s. 43(2), which provides that leave to appeal shall be granted 'where it is of importance, as a matter of precedent, that the appeal be considered by the Supreme Court'.
8. The Act, s. 43(2). Such requirement was introduced in an amendment to the Act which entered into force on 1 March 2019.
9. Översyn av lagen om skiljeförfarande ('Review of the arbitration act'), SOU 2015:37, p. 79.
10. Pages 9 et seq. in the 2019 edition, pp. 2 et seq. in the 2020 edition and pp. 2 et seq. in the 2021 edition.
11. Judgment by the European Court of Justice of 6 March 2018, *Slovak Republic v. Achmea BV*, Case No. C-284/16.
12. Judgment by the Svea Court of Appeal dated 22 February 2019 in Case Nos T-8538-17 and T-12033-7.

[B] Facts

In 1987, Poland, on the one hand, and Luxembourg and Belgium, on the other hand, entered into an investment treaty (the 'Investment Treaty') with a dispute resolution clause (section 9) pursuant to which investors in any of the states being party to the treaty have the right to initiate arbitration proceedings in accordance with three different options, one of which is the Arbitration Rules of the Stockholm Chamber of Commerce (the SCC Rules). Thus, the Investment Treaty is an intra-EU (European Union) Bilateral Investment Treaty, or BIT for short.

PL Holdings, a company registered in Luxembourg, initiated arbitration proceedings against Poland in accordance with the SCC Rules with Stockholm as the seat of arbitration. This was prior to the CJEU's judgment in *Achmea*. PL Holdings submitted that Poland had violated its obligations under the Investment Treaty by expropriating assets of PL Holdings in Poland. PL Holdings claimed damages from Poland.

In June 2017, the arbitral tribunal rendered a partial arbitral award in which it found that Poland had violated its obligations under the Investment Treaty by expropriating PL Holdings' shareholding in a bank and that PL Holdings was entitled to damages. In the final award in September 2017, the arbitral tribunal ordered Poland to pay substantial damages (app. EUR 150 million).

[C] The Judgment by the Court of Appeal

Poland filed actions with the Svea Court of Appeal with regard to both the partial award and the final award. Poland requested that the awards be declared invalid (section 33 of the Act) or be set aside (section 34 of the Act) in light of *Achmea*. With regard to the set aside claim, Poland submitted that the awards should be set aside since they were not based on a valid arbitration agreement.

The Court of Appeal made the following statement with regard to its understanding of *Achmea*:

> The conclusion from the Achmea ruling is therefore that articles 267 and 344 TFEU[13] would not as such preclude Poland and PL Holdings from entering into an arbitration agreement and participating in arbitral proceedings regarding an investment-related dispute. What the TFEU precludes is that Member States conclude agreements with each other meaning that one Member State is obligated to accept subsequent arbitral proceeding with an investor and that the Member States thereby establish a system where they have excluded disputes from the possibility of requesting a preliminary ruling, even though the disputes may involve interpretation and application of EU law. Since the TFEU thus does not preclude arbitration agreements between a Member State and an investor in a particular case, a Member State is, based on party autonomy, free – even though the Member State is not bound by a standing offer as such as that in article 8 of the Achmea case or article 9 in this case – to enter into an arbitration agreement with an investor regarding the same dispute at a later stage, e.g. when the investor has initiated arbitral proceedings. An arbitration agreement and arbitral proceedings

13. The Treaty on the Functioning of the European Union (TFEU).

> between, on the one hand, an investor from a Member State and, on the other hand, a Member State, is therefore as such not in violation of the TFEU.[14]

The Court of Appeal found that the awards should not be declared invalid pursuant to section 33 of the Act.

With regard to setting aside the awards pursuant to section 34 of the Act, PL Holdings, *inter alia,* argued that Poland was precluded from invoking that the arbitral awards were not covered by a valid arbitration agreement since Poland had participated in the arbitral proceedings without raising this objection. Under the applicable rules for the proceedings, PL Holdings argued that Poland was obligated to raise an objection concerning the alleged invalidity of the arbitration agreement no later than in its statement of defence, which Poland had not done.

The Court of Appeal found that pursuant to the applicable SCC Rules, the objection should have been made no later than in the statement of defence. Since it was not made until in the statement of rejoinder, the court concluded, with reference to section 34(2) of the Act, that Poland must be considered to have waived its right to raise the objection.

[D] The Supreme Court's Request for Preliminary Ruling

The judgment was appealed to the Supreme Court which, as noted, requested a preliminary ruling from the CJEU. In its decision, the Supreme Court stated the following under the heading 'The need for a preliminary ruling'.[15]

The question is what the implications of the principles elaborated by the CJEU in *Achmea* have for the outcome of the case before the Supreme Court.

It is clear that the provision regarding dispute resolution in the investment agreement of relevance in this case before the Supreme Court is invalid. Thus, a possible conclusion is that the standing offer to initiate arbitration proceedings, which the state can be said to have extended to an investor through the dispute resolution provision, is also invalid, considering that the offer is closely linked to the investment agreement.

In the case before the Supreme Court, it has also been argued that the situation is different in this case since it is the request for arbitration that constitutes an offer. The state would then, as a result of its freely expressed wishes, expressly or tacitly, be able to accept the jurisdiction of the arbitral tribunal, in accordance with the principles explained by the CJEU with regard to commercial arbitration.

The Supreme Court does not consider it to be clear, or clarified, how EU law shall be interpreted with regard to the issues that arise in this case. Therefore, there are reasons for requesting a preliminary ruling from the CJEU in order to avoid the risk of an incorrect interpretation of EU law.

The Supreme Court formulated the question to the CJEU as follows:

14. Unofficial translation.
15. Decision by the Supreme Court 21 February 2020 in Case No. 1568-19 (unofficial translation).

> Do Articles 267 and 344 TFEU, as interpreted in [the judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158)], mean that an arbitration agreement is invalid if it has been concluded between a Member State and an investor – where an investment agreement contains an arbitration clause that is invalid as a result of the fact that the contract was concluded between two Member States – by virtue of the fact that the Member State, after arbitration proceedings were commenced by the investor, refrains, by the free will of the State, from raising objections as to jurisdiction?

[E] Opinion by Advocate General Kokott

On 22 April 2021, Advocate General Kokott issued her opinion.[16] She proposed the following answer to the questions put by the Supreme Court.

Individual arbitration agreements between Member States and investors from other Member States concerning the sovereign application of EU law are compatible with the duty of sincere cooperation under Article 4(3) TFEU and the autonomy of EU law under Articles 267 and 344 TFEU only if courts of the Member States can comprehensively review the arbitration award for its compatibility with EU law, if necessary after requesting a preliminary ruling under Article 267 TFEU. Such arbitration agreements must furthermore be compatible with the principle of equal treatment under Article 20 of the Charter of Fundamental Rights of the European Union.

[F] Judgment by the CJEU[17]

The CJEU answered the questions put by the Supreme Court as follows:

> Articles 267 and 344 TFEU must be interpreted as precluding national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to those articles.

Thus, the CJEU firmly shut the door to the reasoning advocated by Poland and accepted by the Svea Court of Appeal.

For further details and an analysis of the CJEU's judgment, reference is made to the articles by Andrea Carlevaris (Chapter [5]) and Christopher Vajda (Chapter [3]) of this yearbook.

Here, only the following shall be added with regard to the temporal effects of the judgment. PL Holdings requested that, were the CJEU to find that Articles 267 and 344 TFEU must be interpreted as precluding an arbitration agreement concluded between a Member State and a private investor from another Member State, it should limit the temporal effects of the judgment that it delivers so that the latter does not affect

16. CJEU Case C-109/20.
17. Judgment by the Grand Chamber on 26 October 2021.

arbitration proceedings that have been initiated in good faith on the basis of ad hoc arbitration agreements and concluded before the delivery of that judgment. This request was denied by the CJEU, observing, *inter alia*, the following (paragraphs 65 and 66):

> Indeed, to allow a Member State to replace an arbitration clause, included in an international agreement between Member States, by concluding an ad hoc arbitration agreement in order to make it possible to pursue arbitration proceedings initiated on the basis of that clause, would, as has been held in paragraph 47 above, amount to circumventing that Member State's obligations under the Treaties and, specifically, under Article 4(3) TEU and Articles 267 and 344 TFEU, as interpreted in the judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158). Thus, a limitation of the temporal effects of the present judgment would, in actual fact, entail limiting the effects of the interpretation of those provisions provided by the Court in the judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158).

The Supreme Court has not yet rendered its final award.

§1.04 *AO TYUMENNEFTEGAZ v. FIRST NATIONAL PETROLEUM CORPORATION*

In an award rendered on 30 March 2018 (and corrected on 15 April 2018) in an SCC case seated in Stockholm, the arbitral tribunal ordered Russian company AO Tyumenneftegaz (TNG) to pay damages to the amount of USD 70 million to Houston based First National Petroleum Corporation (FNP), together with default interest pursuant to the Swedish Interest Act from 25 December 1998. The dispute concerned a 1992 cooperation agreement between the parties to set up a joint venture to explore an oil field in the Russian Federation.

TNG initiated proceedings before the Svea Court of Appeal, requesting the award to be declared invalid or set aside in its entirety. As a secondary claim, TNG requested that the provision ordering it to pay interest be set aside. The Court of Appeal denied the primary request but set aside the interest part, pursuant to which TNG had been ordered to pay default interest for a twenty-year period.[18] The Court of Appeal found that the interest awarded was in excess of the interest claims forwarded by FNP in the arbitration (based on damages in the amount actually awarded) and that the arbitral tribunal did not have authority to award interest in its absolute discretion. The Court of Appeal did not give TNG permission to appeal the judgment.

§1.05 *TURKISH COMPANIES v. GAZPROM EXPORT LLC*

In the period covered by this chapter, the Svea Court of Appeal handed down judgments in three very similar set aside cases, with different Turkish companies as

18. Judgment by the Svea Court of Appeal on 2 June 2021 in Case No. T-7070-18.

claimants and Gazprom export LLC ('Gazprom') as respondent.[19] The underlying disputes concerned Gazprom's claim to have prices under gas delivery contracts adjusted. In all three cases, such adjustments were partially granted by the arbitral tribunals.

A common issue in the set aside cases was whether Gazprom's claim in the arbitration proceedings for changes of the price formula had been an 'all or nothing' claim, and that the tribunals, therefore, had exceeded their mandate when they approved only part of the claim (a removal of a specific rebate). The Court of Appeal found that this was not the case in all three cases. Nor were any other set aside grounds invoked by the Turkish companies successful.

Another common feature is that the Court of Appeal in all three cases (with separate sets of judges) drastically cut the costs claimed by Gazprom for counsel (which were the same in all cases). Gazprom was awarded only between 25% and 40% of costs sought.

In none of the cases did the Court of Appeal give permission to appeal the judgment.

§1.06 *NET AT ONCE SWEDEN AB v. TRESVE FIBER IDEELL FÖRENING*

In a small domestic case, the Göta Court of Appeal set aside an award rendered by a sole arbitrator on the basis that the claimant in the arbitration proceedings was considered to lack legal capacity (Sw. '*rättskapacitet*') and therefore could not be a party to the arbitration agreement on which its claim was based. The Court of Appeal allowed appeal to the Supreme Court. The Supreme Court, in its turn, has granted leave.[20] The Supreme Court has not yet decided the case.

§1.07 *ASCOM GROUP S.A. AND OTHERS v. REPUBLIC OF KAZAKHSTAN AND NATIONAL BANK OF KAZAKSTHAN*

In a case of importance for determining sovereign immunity, the Swedish Supreme Court has held that a sovereign state was not immune against enforcement of an arbitration award in listed shares since the purpose of holding those assets was not of a sufficiently qualified nature so as to protect the assets from seizure.[21]

For further details and an analysis of the Supreme Court's decision, reference is made to the chapters in this yearbook by Maria Fogdestam Agius and Ginta Ahrel (Chapter [8]), and Alexander Foerster and Sara Bengtsson Urwitz (Chapter [9]).

19. Judgment by the Svea Court of Appeal on 8 June 2021 in Case No. T-1806-19 with Akfel Gaz Sanayi Ve Ticaret Anonim Sirketi as claimant; Judgment on 6 October 2021 in Case No. T-1040-19 with Enerco Enerji Sanayi ve Ticaret A.S. as claimant; and Judgment on 1 December 2021 in Case No. T-7865-19 with Kibar Enerji Anonim Sirketi as claimant.
20. Judgment by the Göta Court of Appeal on 2 November 2021 in Case No. T-2236-20.
21. Decision by the Supreme Court on 18 November 2021 in Case No. Ö 3828-20, NJA 2021 p. 850.

§1.08 OTHER

In a case brought already in 2020[22] but not yet decided by the Svea Court of Appeal, a party requested that an arbitration award be set aside, *inter alia,* on the basis that the arbitral tribunal during the pandemic ordered a virtual hearing to be held against the objection of the party. The party took the position that the Act gives parties the right to an in-person physical hearing and that it was denied this right by the decision of the tribunal to proceed virtually. This issue has been the subject of intense discussion within the Swedish arbitration community and the judgment, which can be expected in time for the next edition of the Stockholm Arbitration Yearbook, is much anticipated. The large majority of Swedish arbitration practitioners take the view that a virtual hearing can be organized despite objections by one of the parties, but former Chief Justice of the Supreme Court Stefan Lindskog, who has written the leading commentary to the Act, holds the opposite view.

22. Svea Court of Appeal Case No. T-7158-20.