CHAPTER 1

Swedish Arbitration-Related Case Law 2022-2023

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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 2022-30 April 2023. 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 only 6% of all decided cases.[9]

However, in the period covered by this chapter, three awards were declared invalid (of which two were in the same case), one award was set aside in its entirety and one partially.

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

[A] Introduction

As reported in the 2019, 2020, 2021 and 2022 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 which granted leave and requested a preliminary ruling from the Court of Justice of the European Union (CJEU).

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. At pp. 9 et seq. in the 2019 edition, pp. 2 et seq. in the 2020 edition, pp. 2 et seq. in the 2021 edition and pp. 2 et seq. in the 2022 edition.
11. Judgment by the European Court of Justice on 6 March 2018, *Slovak Republic v. Achmea BV*, Case No. C-284/16.
12. Judgment by the Svea Court of Appeal on 22 February 2019 in Case Nos T-8538-17 and T-12033-7.

On 26 October 2021, the Grand Chamber of the CJEU handed down its award. On 14 December 2022, the Supreme Court rendered its award.[13]

[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 (BIT for short).

PL Holdings, a company registered in Luxemburg, 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 (approx. 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[14] 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

13. Judgment by the Supreme Court dated 14 December 2022 in Case No. T 1569-19 (NJA 2022 p. 965).
14. The Treaty on the Functioning of the European Union (TFEU).

> 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 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.[15]

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.[16]

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

> 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] Judgment by the CJEU[17]

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

15. Unofficial translation.
16. Decision by the Supreme Court 21 February 2020 in Case No. 1568-19 (unofficial translation).
17. Judgment by the CJEU on 26 October 2022, Case No. C-109/20.

> 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 PL Holdings and accepted by the Svea Court of Appeal.

[F] Judgment by the Supreme Court

In light of the CJEU judgment, it was clear that the arbitral awards would not stand. The primary issue before the Supreme Court was whether the awards should be declared invalid pursuant to section 33 of the Act or set aside pursuant to section 34.

The Supreme Court applied section 33 and declared the awards invalid based on the following reasoning. An arbitral award issued with reference to a clause like the one in the Investment Treaty must be deemed to have come about in an unlawful way (Sw. 'rättsstridigt sätt') since the award is incompatible with fundamental provisions and principles in the European Union and therefore also in Sweden. To uphold the awards would be clearly incompatible with the basic principles of the Swedish legal system. Accordingly, the awards shall be declared invalid pursuant to section 33 paragraph 1 point 2.

§1.04 *ICA SVERIGE AB V. BERGSALA SDA AB*

In a case brought before the Svea Court of Appeal,[18] the party having lost the underlying arbitration, ICA Sverige AB, requested that the 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 ICA. ICA 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.

Prior to the Svea Court issuing its judgment, this issue was the subject of intense discussion within the Swedish arbitration community. The large majority of Swedish arbitration practitioners took the view that a virtual hearing could be organized despite objections by one of the parties. The opposite view was, however, held by former Chief Justice of the Supreme Court Stefan Lindskog, the author of the leading commentary on the Act.

In its judgment,[19] the Svea Court found as follows. If the parties do not agree otherwise, it must be within the mandate of the arbitration tribunal to decide that participants can attend remotely, by voice or picture transmission. The fact that one

18. Svea Court of Appeal Case No. T 7158-20.
19. Judgment by the Svea Court of Appeal on 30 June 2022 in Case No. T 7158-20.

party opposes attendance in such a form does not alter this. However, the tribunal must always assess whether remote participation is adequate.[20]

In the present case, the Court found that the requirements for a virtual hearing were fulfilled, and the award was upheld.

The Court granted ICA the right to appeal to the Supreme Court, but ICA did not appeal.

§1.05 *PUBLIC JOINT STOCK COMPANY CHELYABINSK METALLURGICAL PLANT V. MINMETALS INTERNATIONAL ENGINEERING CO. LTD.*

The Russian company Public Joint Stock Company Chelyabinsk Metallurgical Plant (CMP) and the Chinese company Minmetals International Engineering Co. Ltd. (Minmetals) entered into a construction agreement in 2008. The contract was terminated by CMP in 2014. At that time, the major part of the work had been performed by Minmetals and had been paid for by CMP.

Minmetals initiated arbitration against CMP. The applicable substantive law was Russian law. In its award rendered in November 2017, the arbitral tribunal (consisting of three Russian lawyers) found that the contract had been rightfully terminated and ordered CMP to pay USD 16,691,176.95 to Minmetals. CMP was also ordered to assist Minmetals in taking down a temporary production unit, including assisting with obtaining necessary permissions for Minmetals' employees.

In 2018, CMP requested that parts of the award be set aside.[21] Eight different grounds were invoked by CMP.

The Svea Court of Appeal found that the tribunal had exceeded their mandate (section 34(1) item 2)[22] by having given a judgment: (i) over something other than requested, (ii) based on circumstances not invoked, and (iii) based on the arbitrators' private knowledge about margins in the construction business. According to the Svea Court, it could not be ruled out that these errors had impacted the outcome of the main monetary part of the award.

With regard to (i), the Court reasoned as follows. The arbitral tribunal has merely ordered CMP to pay a specific amount to Minmetals. Therefore, it is not immediately apparent that the arbitral tribunal's order differs from what was requested. However, the arbitral tribunal's reasons for the award show that the amount CMP was ordered to pay was compensation for Minmetals' costs and not partial and final payment under the contract which was what Minmetals had requested.

As regards (ii), the Court noted that neither party had discussed Minmetals' costs. It was the arbitral tribunal that had introduced the issue of costs and based its award on those costs.

20. The Göta Court of Appeal came to the same conclusion in its judgment mentioned below in § 1.09 (13 March 2023 in Case No. 2556-22).
21. Svea Court of Appeal Case No. T 1356-18.
22. After the amendments in 2019 this is item 3.

Furthermore, the Court found that the arbitral tribunal had not addressed CMP's argument that limitation was applicable to part of Minmetals' claim in the arbitration proceedings. This was qualified as an excess of mandate by the Svea Court. Here, too, it could not be ruled out that the error had impacted the outcome of the relevant part of the case.

Finally, the Court set aside the award with regard to the allocation of the arbitration costs and compensation for party costs.

The Court granted the right to appeal to the Supreme Court. The Supreme Court did not grant leave.

§1.06 *KINGDOM OF SPAIN V. NOVENERGIA II – ENERGY & ENVIRONMENT (SCA), SICAR, B 124550*

The Energy Charter Treaty (ECT) is an international agreement that establishes a multilateral framework for cross-border cooperation in the energy industry. It is an investment protection agreement.

Section 26 of the ECT contains a dispute resolution clause which, *inter alia*, refers to arbitration pursuant to the SCC Rules.

The Spanish energy market was deregulated in the later part of the 1990s.

In 2007, Novenergia invested in the market by acquiring eight solar cell parks.

During the years 2010 to 2014, Spain adopted regulations that reduced subventions of energy from renewable sources that had been in force since 2007.

Spain is bound by the treaty, as is Luxemburg.

Novenergia II - Energy & Environment (SCA), SICAR, B 124550 (Novenergia) is a finance company seated in Luxemburg.

In 2015, Novenergia requested arbitration against Spain pursuant to the SCC Rules. Novenergia claimed that Spain had breached Article 10.1 (Requiring a fair and equitable treatment) and Article 13 (expropriation) of the ECT.

In the subsequent arbitral award, rendered in 2018, the tribunal found that Spain had breached Article 10.1, and Spain was ordered to pay damages in the amount of EUR 53.3 million.

The same year, Spain initiated proceedings before the Svea Court of Appeal, requesting that the award be set aside or declared invalid.[23]

One of Spain's grounds for invalidity was that the dispute could not be settled by arbitration. Spain referred to the CJEU's judgments in *Achema*, *Komstroy*[24] and *PL Holdings*.

The Svea Court found,[25] primarily with reference to Komstroy (which also concerned Article 26 of the ECT), that Spain and Novenergia could not agree that the issues in dispute be settled by arbitration.

23. Svea Court of Appeal Case No. T 4658-18.
24. Judgment by the CJEU on 2 September 2021, Case No. C-741/19.
25. Judgment by the Svea Court of Appeal on 13 December 2022 in Case No. T 4658-18.

The Court summed up its findings as follows. By the CJEU's case law, it is made clear that disputes relating to the ECT must not be excluded from the jurisdiction of national courts and that, therefore, Article 26.2 c) does not apply to disputes between a Member State and an investor from another Member State regarding an investment made in the Member State.

Pursuant to section 33 (1) item 1 of the Act, a Swedish arbitral award can be declared invalid if it determines an issue which under Swedish law cannot be decided by arbitrators. The Court held that the CJEU's case law must be deemed equal thereto.

Accordingly, the Court declared the 2018 award invalid.

The Court granted the right to appeal to the Supreme Court. The Supreme Court did not grant leave.

§1.07 *OLEG DERIPASKA V. MONTENEGRO*

Russian oligarch Oleg Deripaska initiated arbitration proceedings against the State of Montenegro under a BIT entered into in 1995 between the Government of the Russian Federation and the Government of the Federal Republic of Yugoslavia. The arbitral tribunal dismissed the case on the basis that it lacked jurisdiction since the BIT referred to by Oleg Deripaska was not binding between the Russian Federation and Montenegro.

Pursuant to section 36 of the Act, an award whereby the arbitrators concluded the proceedings without ruling on the issues submitted to them for resolution may be amended, in whole or in part, upon the application of a party.

Oleg Deripaska requested that the Svea Court of Appeal should vacate the award.

The first issue confronted by the Svea Court was how in-depth its examination of the jurisdictional issue should be.

Montenegro referred to the following findings by the Supreme Court in the 2019 *Belgor* case:[26]

> When a court in set aside proceedings shall assess the arbitration tribunal's conclusion with regard to jurisdiction, it shall take into consideration that typically the tribunal is best suited to determine its jurisdiction. Therefore, the starting point for the court should be that the arbitration tribunal's interpretation and assessment of evidence is correct. In the challenge procedure it shall be assessed if the claimant has demonstrated that the tribunal incorrectly determined the reach of the arbitration agreement.

Montenegro argued that the Court in proceedings under section 36 of the Act should also make such a limited examination of the case where the starting point should be that the tribunal's interpretation and assessment of evidence is correct. Oleg Deripaska took the position that the Court under section 36 should make a full assessment of the facts and evidence invoked with regard to the jurisdictional issue.

Referring to the legal literature (primarily former Supreme Court Chief Justice Stefan Lindskog), the Svea Court found that the Supreme Court's findings in Belgor

26. Judgment by the Supreme Court on 20 March 2019 in Case No. T 5437; *see* SAY 2019 pp. 2 et seq.

should be limited to the context of that case. Belgor shall not, stated the Svea Court, be interpreted to mean that the starting point when examining a tribunal's jurisdiction should always be that the tribunal's interpretation and assessment of evidence is correct.

On the basis of this reasoning, the Court concluded that it must make a new and complete assessment of the jurisdictional issue.

The Court added that it should make no difference if the jurisdictional issue arose in set aside proceedings, proceedings under section 2 of the Act, or proceedings under section 36.

The key issue to be addressed by the Court was whether the BIT invoked by Oleg Deripaska is binding between the Russian Federation and Montenegro. After an in-depth examination of the law on state succession and treaty succession, the Court found that Oleg Deripaska had not demonstrated that the arbitration tribunal had jurisdiction over the dispute brought by him.

The Court granted the right to appeal to the Supreme Court. The Supreme Court did not grant leave.[27]

§1.08 *KB LANDBYSKA VERKET 11 V. THE GRAND GROUP AKTIEBOLAG*

In 2018, KB Landbyska Verket 11 (Landbyska Verket) entered into a rental agreement with The Grand Group Aktiebolag (Grand Group) for premises in a building owned by Landbyska Verket. The Grand Group was to conduct hotel business on the premises. The Grand Group had the right to transfer the agreement to another company in the same group without Landbyska Verket's prior written consent if the Grand Group provided acceptable security for the whole rental period for the tenant's obligations under the agreement.

The Grand Group's subsidiary, The Sparrow Hotel AB (Sparrow), conducted the hotel business. A dispute arose between Landbyska Verket and the Grand Group. The issues in dispute were whether the rental agreement had been transferred from the Grand Group to Sparrow and, if so, if Grand Group had provided acceptable security.

Landbyska Verket initiated arbitration with regard to disputed issues. Landbyska Verket's first hand claim was that no valid transfer of the agreement had occurred. Its second hand claim was that the Grand Group should be ordered to provide security for the tenant's obligations under the agreement for the whole rental period. Such security was to be unlimited or limited to an amount of at least SEK 556,400,894 or an amount determined by the arbitral tribunal found to be sufficient to cover the obligations for the full rental period.

In its award, the arbitral tribunal rejected Landbyska Verket's first hand claim. With regard to the second-hand claim, the arbitral tribunal ordered the Grand Group to issue a guarantee for Sparrow's obligations under the agreement valid for the whole rental period 'and corresponding to in total 36 month's guarantee rent'.

27. Judgment by the Svea Court of Appeal on 10 November 2022 in Case No. T 731-20.

Landbyska Verket initiated set aside proceedings in the Svea Court of Appeal.[28] The claimant's first ground for setting aside the award was that the arbitrators had exceeded their mandate by formulating its award differently from what had been claimed by Landbyska Verket.

The Svea Court found that Landbyska Verket's claim must be understood to mean that the security requested was for a specific amount and that it was already clear from the arbitral award that the arbitral tribunal had deviated from the claim. Nor could a specific amount be derived from the reference to thirty-six months guarantee rent.

The Court's conclusion was that the arbitral tribunal had distanced itself too far from what had been claimed by Landbyska Verket by not specifying an amount for the security to be provided. Accordingly, the arbitral tribunal had exceeded their mandate, and the award was set aside.

One of the judges dissented.

The Court granted the right to appeal to the Supreme Court.[29] On 26 June 2023, the Supreme Court decided that it will take the case.

§1.09 *NET AT ONCE SWEDEN AB V. TRESVE FIBER IDEELL FÖRENING*

In a minor 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 and, therefore, could not be a party to the arbitration agreement on which its claim was based.[30] The Court allowed appeal to the Supreme Court, and the Supreme Court granted leave and came to the opposite conclusion, i.e., that claimant had legal capacity. Since the defendant had other objections to the arbitral award, which had not been addressed by the Court of Appeal, the case was sent back there.[31] The Court of Appeal subsequently found against the claimant, resulting in the arbitral award standing.[32]

28. Svea Court of Appeal Case No. T 3623-21.
29. Judgment by the Svea Court of Appeal on 24 November 2022 in Case No. T 3623-21.
30. Judgment by the Göta Court of Appeal on 2 November 2021 in Case No. T 2236-20.
31. Judgment by the Supreme Court on 30 June 2022 in Case No. T 7416-21 (NJA 2022 p. 592).
32. Judgment by the Göta Court of Appeal on 13 March 2023 in Case No. 2556-22.