CHAPTER 1

Swedish Arbitration-Related Case Law 2017–2019

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§1.01 INTRODUCTION

This chapter will account for court cases relevant to arbitration law from the Swedish Supreme Court and the appellate courts for the period 1 July 2017–30 April 2019. It does not purport to be exhaustive; the aim is merely 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]

The by far largest number of cases under the Act during the period covered by this chapter concerns requests to set aside arbitration awards for alleged procedural errors. In addition, there are several cases where enforcement of a foreign award has been opposed, and one in which the losing party sought to reduce the fees awarded to an arbitrator.

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

1. Lagen (1999:116) om skiljeförfarande.
2. The Act, section 46.
3. The Act, sections 52 et seq.

cases since the Court of Appeal is Court of First Instance for set aside and enforcement cases.

§1.03 SET ASIDE CASES

[A] Introduction

Swedish arbitral awards can be set aside 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.[4] An action to set aside an arbitration award shall be considered by the Court of Appeal within whose district the arbitral proceedings were seated.[5] The Court of Appeal's permission is required in order to appeal its judgment.[6] 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.[7]

Historically, set aside actions have very rarely been successful. A statistical survey for the period 1 January 2004–31 May 2014 shows that only seven arbitral awards were set aside pursuant to section 34 of the Act.[8] In contrast, four arbitration awards were set aside, in whole or in part, in the much shorter period covered by this chapter.

[B] *Belgorkhimprom v. Koca*

In *Belgorkhimprom v. Koca*,[9] the parties (Belarusian and Turkish) had entered into a construction contract pursuant to which Koca should perform certain work for Belgorkhimprom in Turkmenistan. The construction contract included an arbitration clause referring to arbitration under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules).

Following the termination of the contract by Belgorkhimprom, Koca initiated arbitration. In an arbitration award in April 2015, the arbitration tribunal ruled in favour of Koca, albeit not in full. With regard to costs, the tribunal ordered each party to bear its own costs.

Belgorkhimprom challenged the award and requested that it be set aside in its entirety or at least in part.

4. The Act, section 34, subsection 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.
5. The Act, section 43, subsection 1. The large majority of set aside proceedings are brought before the Svea Court of Appeal. The reason for this is that most Swedish arbitrations are seated in Stockholm.
6. The Act, section 43, subsection 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'.
7. The Act, section 43, subsection 2. Such requirement was introduced in an amendment to the Act which entered into force on 1 Mar. 2019.
8. Översyn av lagen om skiljeförfarande ('Review of the arbitration act'), SOU 2015:37, p. 81.
9. Judgment by the Svea Court of Appeal on 31 Oct. 2017 in Case No. T 6247-15.

According to the Svea Court of Appeal, the arbitration tribunal had incorrectly found that certain additional works performed by Koca were covered by the construction contract and the arbitration clause therein.[10] Therefore, the Court of Appeal concluded that the tribunal had ruled on an issue that was not covered by a valid arbitration agreement between the parties.[11]

It is worth noting that the arbitration tribunal had found that the additional works did not 'arise out of' the construction contract but that such works were performed 'in connection with' the construction contract which, in the opinion of the tribunal, was sufficient for jurisdiction.[12] However, with reference to the Supreme Court case NJA 2017 p. 226, the Court of Appeal found that such connectivity could not create jurisdiction in the case at hand.

The Court of Appeal also found that the arbitration tribunal had committed a procedural error that likely affected the outcome of the case by assuming that the parties were in agreement that interest should be calculated from a certain point in time when they, in fact, were not.[13]

The question then arose if the arbitration award should be set aside in its entirety or only with regard to the parts regarding additional works and interest. The Court of Appeal stated that it would best accord with the finality of arbitration awards to set aside only those parts directly affected by the errors found. Only if a partial set aside is not possible without other parts being affected should the award be set aside in its entirety. In the present case, the Court of Appeal found that other parts of the award would not be affected by reducing the amount awarded to Koca with the monetary effects relating to additional works and interest calculation. Nor would the allocation of costs between the parties as determined in the arbitration award be affected thereby. Therefore, the award was not set aside in its entirety but only in those parts where the Court of Appeal had identified procedural errors, in total app. USD 2.5 million of the awarded app. USD 9 million.

The Court of Appeal granted leave to appeal to the Supreme Court.

In what arguably is one of the most important arbitration law judgments for years, the Supreme Court reversed the Court of Appeal and upheld the arbitration award in full.[14]

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10. Belgorkhimprom argued that the additional works were covered by a dispute resolution clause referring to the 'Minsk economic court'.
11. This, of course, is a ground for setting aside the award; section 34 of the Act, subsection 1, item 1.
12. The arbitral tribunal found that 'the claims concerning Additional Works are covered by the arbitration clause in the contract'. As to the reference to the 'Minsk economic court', the tribunal did not find that such reference had replaced the arbitration clause in the construction contract.
13. Belgorkhimprom also alleged that it had been deprived of its right to be heard as a result of the arbitral tribunal not granting certain extensions and denying the request that an independent expert be appointed. The Court of Appeal dismissed these grounds for setting aside the award. This issue will be further addressed below in connection with the judgment by the Supreme Court.
14. Judgment by the Supreme Court dated 20 Mar. 2019 in Case No. T 5437-17. Under recent practice to name cases, the Supreme Court refers to this judgment as 'Belgor'.

With regard, first, to the issue whether the arbitration tribunal had jurisdiction in relation to the additional works, the Supreme Court reasoned as follows, first addressing the law and then applying those findings to the current case.

The Supreme Court started off by saying that under Swedish law an arbitration agreement can refer to future disputes but only in relation to a specific legal relationship identified in the agreement (the Act, section 1, subsection 1).

The court went on to state that general principles for contract interpretation apply when determining what is covered by an arbitration clause. When the wording allows for different interpretations and guidance cannot be found in surrounding circumstances, it is natural to assume, the Supreme Court said, that the arbitration agreement shall fulfil a rational function (Sw. '*förnuftig funktion*') that takes the interest of the parties into account in a reasonable manner (Sw. '*en rimlig reglering av parternas intressen*'). In that connection, the Supreme Court found that '[t] he parties must be assumed to have wanted that disputes shall be solved without delay and in one proceeding before an arbitral tribunal chosen by them.'

The Supreme Court then found that principles underlying the 1958 New York Convention shall be observed when interpreting arbitration agreements and the concept 'legal relationship' in the Act. According to Article II.1 of the New York Convention, contracting states shall recognize a written agreement in which the parties undertake to submit to arbitration any and all differences which have arisen or which may arise between them in respect of a defined legal relationship. The Supreme Court observed that the principles underlying the New York Convention have been considered, in foreign case law and the international legal literature, to warrant a generous interpretation of the arbitration agreement and the Convention's concept 'legal relationship' in section II.1.[15]

The Supreme Court went on to state that the concept 'legal relationship' in section 1 of the Act is not limited to the rights and obligations set forth in the original agreement. Also later developments that change the content of the agreement fall under the concept and therefore within the sphere of application of the original agreement.

The Supreme Court noted that sometimes the legal grounds for a party's case might lie outside the arbitration clause.[16] However, the court added, a ground that falls outside of the contractual relationship may still be encompassed by the arbitration clause. This statement is made with reference to NJA 2007 p. 475 where a non-contractual ground invoked by a party was considered to be so closely connected to contractual grounds invoked that it was considered to be covered by the arbitration agreement.

When assessing whether a case brought by a party is covered by an arbitration agreement, the arbitration tribunal sometimes needs to perform a thorough analysis of the parties' relationship. In such cases, the Supreme Court stated, there are reasons to

15. Here, the Supreme Court referred to Gary B. Born, International Commercial Arbitration, 2nd ed., 2014 ('Born'), pp. 1317 et seq, and Howard M. Holtzmann and Joseph E. Neuhaus, A Guide to The UNCITRAL Model Law on International Commercial Arbitration, 1994, p. 259.
16. Here, reference was made to the Supreme Court cases NJA 2012 p. 183 and NJA 2010 p. 734.

assume that parties in a commercial contractual relationship aim for disputes within that relationship to be resolved in one and the same forum. Otherwise, there is a risk for delay, increased costs and conflicting awards in cases related to each other.[17]

The Supreme Court added that 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.

Taking into account the above, in the challenge procedure, it shall be assessed if the claimant has demonstrated that the tribunal incorrectly determined the reach of the arbitration agreement.

Applying these findings to the case at hand, the Supreme Court found that there was no basis for not accepting the arbitration tribunal's assessment of the parties dispute resolution agreement. In so doing the Supreme Court noted *inter alia* that the tribunal had concluded that it reasonably must have been the intent of both parties to have all disputes between them settled in one and the same forum.

Accordingly, the Court of Appeal's decision to vacate the part of the award dealing with additional works was reversed.

Also with regard to the other part of the arbitration award set aside by the Court of Appeal (interest), the Supreme Court came to a different conclusion.

The background was as follows. When awarding Koca interest, the arbitration tribunal had done so on the basis that it was common ground between the parties that interest should be awarded from the date when an invoice was issued. However, Belgorkhimprom had, in fact, objected to this in the proceedings and argued that interest should start running from when it received the invoice. The arbitration tribunal failed to take this objection into account. The Supreme Court noted that this presumably was the result of an omission or a misunderstanding.

The Supreme Court noted, *inter alia*, that the set aside rules are designed to create a balance between, on the one hand, a quick and final settlement of the dispute and, on the other hand, the possibility to object to an error committed by the tribunal which is of considerable importance from a quality or quantitative point of view. The Supreme Court added that the impact of the error must be of reasonable importance (Sw. '*rimlig betydelse*') for the party seeking to vacate the award.

The Supreme Court agreed with Belgorkhimprom that the arbitration tribunal had erred when proceeding as if it was common ground from which time interest should be calculated. However, when it comes to the impact of such error, the Supreme Court noted (i) that the evidence brought by Belgorkhimprom was limited to one invoice and (ii) that the quantitative impact in respect of that invoice was limited to a few interest days. Therefore, the Supreme Court concluded, the impact of the procedural error cannot be considered to have been of reasonable importance to Belgorkhimprom, regardless of if there were one or more invoices with such discrepancy. Accordingly, the arbitration award was upheld also in this regard. It can safely be

17. Reference was made to Born, pp. 1317 et seq.

assumed (although not specified in the judgments) that the actual impact of the error with regard the calculation of interest was very small whereas the total amount of interest awarded by the tribunal and set aside by the Court of Appeal was almost USD 1.7 million.

Belgorkhimprom also argued that the arbitration award should be set aside because the arbitration tribunal had rejected its requests for extension with submitting an export report and rejected its request that the arbitration tribunal appoint an expert. The Court of Appeal had not found these decisions to be grounds for setting aside the arbitration award.

The Supreme Court found as follows.

First, denial of a party's request that the tribunal appoint an expert of its own cannot constitute a procedural error unless something different follows from the arbitration agreement.

Second, with regard to the requests for extension, the Supreme Court stated that the arbitration tribunal is best suited to assess if such requests shall be approved or denied. As a starting point, the Supreme Court added, the decision by the arbitration tribunal shall be accepted unless it is indefensible (Sw. '*oförsvarligt*'). The Supreme Court added that case law in relation to Article V 1(b) of the New York Convention shall be taken into account when making the assessment.

A further condition for an arbitration award being set aside based on how the tribunal has handled an extension request is that the complaining party has not itself caused its predicament. It is required, stated the Supreme Court, that the party has invoked circumstances in the arbitration proceedings that demonstrate that he was prevented from presenting his case in time and that this was due to circumstances outside his control (which he should not have foreseen) and that alternative ways to present the case were clearly lacking.

It should be noted that four of the five justices rendering the Supreme Court judgment are experienced arbitrators.[18]

The main conclusions to draw from the Supreme Court's judgment in *Belgorkhimprom v. Koca* are the following.

First, when determining the scope of an arbitration agreement, there are reasons to assume that parties in a commercial contractual relationship will want to have all disputes within that relationship resolved in a single forum. Further, in challenge procedures, there should be a presumption for the arbitrators having correctly determined which issues are covered by the arbitration agreement. This is so since they typically are best suited to determine their jurisdiction. The overriding conclusion in this regard could perhaps be that the Supreme Court favours a pragmatic approach when determining the scope of an arbitration agreement, with a presumption for the tribunal to have made a correct assessment.

18. Swedish Supreme Court justices are allowed to act as chairmen in arbitration proceedings. While the majority of the sixteen justices do not act as arbitrators on a regular basis, the four justices involved in this case do. Two of these justices also have vast experience of arbitration as both arbitrator and counsel from previous careers as lawyers.

Second, procedural errors with very limited impact on the outcome of the case shall not result in an award being set aside, in whole or in part.

Third, the Supreme Court now makes clear that the arbitrators (as opposed to courts in challenge proceedings) are best suited to determine whether extensions should be granted (and possibly also other procedural issues). Therefore, the tribunal's decision shall be left standing unless 'indefensible', a very high bar indeed.

[C] *CicloMulsion v. NeuroVive et vv*

In *CicloMulsion v. NeuroVive et vv*,[19] the parties (German and Swedish) had entered into a licence agreement for certain pharmaceutical technology. The agreement contained an arbitration clause referring disputes to the SCC Rules.

Arbitration proceedings were initiated in 2013, and in 2016 the arbitration tribunal rendered a partial award. Both parties brought set aside actions against the award with the Court of Appeal for Skåne and Blekinge. CicloMulsion requested that certain parts of the award be set aside, while NeuroVive wanted other parts vacated.

In a procedural order in June 2014 (PO10), the arbitration tribunal had set out certain premises on which the continued proceedings would be based, including that CicloMulsion's right to royalty would encompass payments to NeuroVive prior to a certain event (referred to as the first launch) and that CicloMulsion's royalties would not be contingent on such first launch. The arbitration tribunal had provided reasons for these premises in a memorandum attached to PO10.

In PO10 the arbitration tribunal had also stated that if, in the continued proceedings, it would find it necessary to deviate from the premises set out in PO10, it would not do so without first notifying the parties and giving them the opportunity to be heard.

However, in the challenged partial award, the arbitration tribunal did not adhere to the premises set out in PO10 and did so without first giving the parties the opportunity to comment. The result of the tribunal's course of action was that several of CicloMulsion's prayers for relief were denied.

The Court of Appeal found that the arbitration tribunal had failed to apply what the tribunal itself had set out in PO10, i.e. not to deviate from the premises therein without first giving the parties an opportunity to be heard, and that therefore an irregularity occurred in the course of the proceedings which probably influenced the outcome of the case. Accordingly, there were grounds to set aside the decisions relevant to this finding.

The counterparty, NeuroVive, challenged the award in other parts. NeuroVive was successful with one of its claims. The Court of Appeal found that the arbitration tribunal in the dispositive part of its award had made a decision that went beyond CicloMulsion's prayers for relief. By so doing, the arbitration tribunal had exceeded its

19. Judgment by the Court of Appeal for Skåne and Blekinge dated 12 Jan. 2018 in Case No. T 2131-16.

mandate and since its course of action had likely affected the outcome of the case, the relevant part of the award should be annulled.

As noted above, the Court of Appeal found for CicloMulsion with respect to its challenge based on the arbitration tribunal not adhering to PO10. However, instead of the annulment of the award in this respect, CicloMulsion requested that the issues be referred back to the arbitration tribunal for it to take action to eliminate the grounds for annulment (the proceedings were ongoing). The basis for this request was section 35 of the Act, which provides that a court in set aside proceedings may stay proceedings 'in order to provide the arbitrators with an opportunity to resume the arbitral proceedings or to take some other measure which … will eliminate the ground for the … setting aside'. NeuroVive objected to such course of action.

The Court of Appeal denied CicloMulsion's request with the following reasoning. The arbitration award must in any event be annulled in the part successfully challenged by NeuroVive. That, in conjunction with the relationship that exists between different parts of the award, speaks in favour of other parts not being referred back to the arbitration tribunal. A further reason against such referral was that available remedial actions would not be simple and purely objective in character.[20] Therefore, on balance, the Court of Appeal found that the award should be annulled also in these parts.

The Court of Appeal granted leave to appeal to the Supreme Court.

NeuroVive appealed.

As noted above, one of the grounds for setting aside an arbitration award is when, without fault of the party, an irregularity has occurred which probably influenced the outcome of the case (the Act, section 34, subsection 1, item 7).

In its judgment, the Supreme Court noted that this provision only applies to qualified errors (Sw. '*mer kvalificerade fel*'). It is not sufficient that there is a considerable risk that the error influenced the outcome of the case; there must be a manifest connection (Sw. '*påtagligt samband*') between the error and the outcome. Moreover, and with reference to the *Belgor* case, the Supreme Court stated that the error must be of reasonable importance to the party seeking to set aside the award.

The Supreme Court went on to note that there is support in the legal literature for presuming a connection in case of serious errors. There is also, said the Supreme Court, some support for this in precedence (NJA 2009 p. 128).

The Supreme Court added that a presumption of this kind can be warranted by the fact that it can be difficult to prove that an error has influenced the outcome while at the same time it can be seriously called into question whether the proceedings have been acceptable. This can, for example, be the case where no reasons for the award whatsoever have been provided or if only two arbitrators have participated in the deliberations or if a party has not been given sufficient opportunity to present his case.

20. In this regard, the Court of Appeal referred to Former Chief Justice Lindskog who in his commentary to the Act has stated that it is normally not appropriate for the tribunal to deal with the issue if its action must be based on subjective values rather than being more objective in character.

According to the Supreme Court, the threshold for presuming a connection between error and outcome must be fairly high (higher than is the case in civil procedure in the courts).

With regard to the case at hand, the Supreme Court found that the error had resulted in CicloMulsion being deprived of the opportunity to fully argue its case. However, when determining whether the error likely influenced the outcome, it must also be taken into consideration that CicloMulsion had been entitled to rely on the issue addressed in PO10 not to be reconsidered by the arbitration tribunal. The arbitration tribunal had, stated the Supreme Court, in fact, retried an issue that for good reason could be considered closed.

The Supreme Court concluded as follows. The error was such that important principles of rule of law (Sw. '*rättssäkerhetsprinciper*') had been set aside. This, in conjunction with the fact that the evidence supported that CicloMulsion would have further argued its case had it known that it was not closed in this regard, meant that there were reasons to presume that the error has influenced the outcome. Therefore, the Court of Appeal's judgment was upheld.

[D] *Republic of Poland v. PL Holdings S.a.r.l.*

In the *Republic of Poland v. PL Holdings S.a.r.l.* ('PL'),[21] the Svea Court of Appeal dealt with a situation similar to the one in the *Achmea* case.[22]

In 1987, the Republic of Poland, on the one hand, and Luxembourg and Belgium, on the other hand, entered into an investment treaty (the 'Investment treaty') which contains a dispute resolution clause (section 9) pursuant to which investors in any of the states party to the treaty have the right to initiate arbitration proceedings in accordance with three different options, one of which is the SCC Rules.

PL is a company registered in Luxemburg.

On 26 November 2014, PL initiated arbitration proceedings against Poland in accordance with the SCC Rules with Stockholm as the seat of arbitration. PL claimed that Poland had violated its obligations under the Investment treaty by expropriating assets of PL in Poland. According to PL, the Polish supervisory authority had, in violation of the Investment treaty, decided to abolish PL's voting rights for shares in a Polish bank and force the sale of the shares. With reference hereto, PL claimed damages from Poland.

On 28 June 2017, the arbitration tribunal rendered a partial arbitral award in which the tribunal found that Poland had violated its obligations under the Investment treaty by expropriating PL's shareholding in the bank and that PL was entitled to damages. However, the tribunal did not award any damages to PL in that ruling; instead it reopened the arbitration proceedings with regard to the amount of damages.

21. Judgment by the Svea Court of Appeal dated 22 Feb. 2019 in Case Nos T 8538-17 and T 12033-17.
22. Judgment by the European Court of Justice of 6 Mar. 2018, *Slovak Republic v. Achmea BV*, Case No. C-284/16.

On 28 September 2017, the arbitration tribunal rendered its final award, ordering Poland to pay damages to PL in the amount of PLN 653,639,384 (app. SEK 1.5 billion), plus interest and compensation for costs.

On 28 September 2017, Poland filed an action with the Svea Court of Appeal against PL with regard to the partial arbitral award and on 27 December 2017 in relation to the final award.

On 13 June 2018, the Court of Appeal decided to stay the enforcement of the final arbitral award until further notice.

Poland invoked several grounds for having the awards declared invalid[23] or set aside. Here, the focus will be on the grounds referring to the *Achmea* case.

In summary, Poland invoked the following. The arbitral awards shall be declared invalid (pursuant to section 33 of the Act) or be set aside (pursuant to section 34 of the Act) as a result of the *Achmea* ruling. A number of circumstances shall lead to the invalidity of the awards, under two rules. The first is that the awards determined issues that may not be determined by arbitrators, and the second is that the awards, or the manner in which they arose, are clearly incompatible with Swedish ordre public. Alternatively, the awards shall be set aside (under section 34 of the Act) as they are not based on a valid arbitration agreement.

PL disputed the award being declared invalid or set aside. With regard to the latter, PL *inter alia* argued that Poland participated in the proceedings without objection, with the result that Poland shall be considered to have waived its right to object that no valid arbitration agreement existed.

Poland argued that it is a direct consequence of Achmea that the awards in the present case are invalid or should be set aside for lack of a valid arbitration agreement due to violation of Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU). PL, for its part, argued that Achmea has a significantly more limited scope of application. According to PL, the ruling is directed towards EU Member States and means that the Member States may not enter into investment treaties with arbitration clauses of the type in question and may be obligated to terminate existing such treaties. However, Achmea does not mean that an arbitration agreement between an individual investor and a Member State is invalid.

The Svea Court of Appeal agreed with PLs line of reasoning as to the implications of Achmea and stated the following:

> The conclusion from the Achmea ruling is therefore that articles 267 and 344 TFEU 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

23. Pursuant to section 33 of the Act, an arbitration award can be declared invalid *inter alia* if (i) the award determines an issue which according to Swedish law may not be decided by arbitrators and (ii) if the award or the manner in which it arose is clearly incompatible with the basic principles of the Swedish legal system.

> 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 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.

After making this finding the Court of Appeal, with brief reasons, found that the awards should not be declared invalid under section 33 of the Act and proceeded to what became the main issue in the case, namely whether the awards should be set aside pursuant to section 34 of the Act due to lack of a valid arbitration agreement.

According to Poland, no valid arbitration agreement existed since Article 9 of the Investment treaty violated Articles 267 and 344 of the TFEU.

As noted above, PL *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 proceeding without raising this objection. Under the applicable rules for the proceedings, PL argued, 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 did not do.

Accordingly, the Court of Appeal was called upon to decide if Poland had raised its *Achmea* argument in time.

The relevant provision in the Act is section 34, second paragraph, according to which a party does not have the right to invoke a circumstance in support of setting aside an award if the party, by participating in the proceedings without objecting, or in any other way, can be considered to have waived its right to make such objection.

The Court of Appeal noted that the preparatory works to this provision show that it may generally be presumed that a party which participates in a proceeding without immediately objecting to the arbitration tribunal's jurisdiction has accepted its jurisdiction.

As to the facts, PL requested arbitration in November 2014 and it was not until its statement of rejoinder in May 2016 that Poland raised the objection that the tribunal lacked jurisdiction on the grounds that the Investment treaty was invalid for violating EU law.[24]

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 first made in the statement of rejoinder, the court concluded, with reference to the Act section 34, second paragraph, that Poland must be considered to have waived its right to raise the objection.

In that connection, it is worth noting that the Court of Appeal claimed to find support for its reasoning in the German Bundesgerichthof's award in *Achmea*.

24. In the statement of defence, Poland had made another jurisdictional objection, namely that PL should not be considered an investor within the meaning of the Investment treaty.

The Bundesgerichthof, the Court of Appeal noted, took into account that Slovakia already when the arbitration was initiated had objected against the arbitration tribunal's jurisdiction on grounds that the arbitration clause was incompatible with EU law and that such objection had been maintained throughout the proceedings. The Bundesgerichthof found, noted the Court of Appeal, that this meant that Slovakia had not acted in a manner whereby Achmea had reason to believe that Slovakia had accepted the existence of a valid arbitration agreement. The Svea Court of Appeal concluded that although German and Swedish law differs in certain regards, the German ruling supported the conclusion that it is relevant for the question of the validity of the arbitration agreement whether an objection based on EU law was timely submitted.

As noted above, Poland also invoked several other grounds for setting aside the award. These were all unsuccessful, with the exception that so-called pre-award interest was found to have been awarded two days later than the time frame in which the tribunal should have ruled on this issue following a request from PL for an additional award. This was considered to be an excess of mandate pursuant to section 34, subsection 1, item 2, of the Act and the award was vacated in this part.[25]

The Court of Appeal granted leave to appeal to the Supreme Court. Both parties have appealed, but the Supreme Court has not yet decided the case.

[E] *SJ v. Arriva*

In *SJ v. Arriva*,[26] the Svea Court of Appeal found that the arbitrators had exceeded their mandate and annulled the arbitration award.

SJ and Arriva, two Swedish companies, had entered into an agreement to cooperate in a jointly owned company, Botniatåg, for conducting train services in northern Sweden. SJ and Arriva had agreed in their cooperation agreement to finance Botniatåg in order to secure Norrtågstrafiken.

Botniatåg encountered some initial difficulties in operating the train services. SJ, which itself is a train operator, assisted Botniatåg by conducting some of its services. SJ sought compensation from Arriva under the cooperation agreement for costs incurred in connection with its assistance to Botniatåg. Arriva did not pay, and SJ requested arbitration pursuant to the dispute resolution clause in the cooperation agreement.

The arbitration tribunal found that the cooperation agreement did not give the parties, SJ and Arriva, any right to make claims against each other. According to the arbitration tribunal, the cooperation agreement was construed to the effect that only Botniatåg, the joint venture company, could make claims against Arriva regarding the undertakings in the agreement. Therefore, since SJ had no direct recourse against Arriva under the agreement, SJ's claim was denied.

SJ brought set aside action. The Court of Appeal noted that Arriva's position in the arbitration proceedings had been that it indeed was possible for the parties, SJ and

25. After the amendments to the Act entering into force on 1 Mar. 2019, excess of mandate is regulated in item 3.
26. Judgment by the Svea Court of Appeal dated 5 Mar. 2018 in Case No. T 3179-17.

Arriva, to make claims against each other under the cooperation agreement (a right of recourse) if Botniatåg had invoked the guarantee in the agreement and a party had performed in accordance with such request. Arriva's argument in denying SJ's claim in the arbitration proceedings, the Court of Appeal noted, had been that Botniatåg had not called upon the guarantee in the cooperation agreement and that, consequently, SJ's performance could not be subsumed under the recourse provision in the agreement. Because of this, SJ's right of recourse against Arriva had not come into play.

The Court of Appeal found that it had been common ground between SJ and Arriva in the arbitration proceedings that a right of recourse existed between the parties. Despite this, the arbitration tribunal had ruled that SJ and Arriva had not had any right of recourse against each other. By doing so, the Court of Appeal found, the arbitrators had based their ruling on a material fact not invoked by the parties (i.e., that a right of recourse had not existed) and therefore had exceeded their mandate.

The Court of Appeal went on to state that the excess of mandate had probably influenced the outcome of the case and that the award, therefore, should be set aside. The Court of Appeal noted that the excess of mandate provision in section 34 of the Act did not include an express requirement that the outcome is likely to be affected but stated that it follows from case law and the legal literature that such requirement nevertheless applies.[27]

The Court of Appeal did not grant leave to appeal to the Supreme Court.

[F] *Russian Federation v. ALOS 34 et al*

In *Russian Federation v. ALOS 34 et al*,[28] four Spanish fund companies initiated arbitration against the Russian Federation under a bilateral investment treaty originally entered into by Spain and the Soviet Union, alleging that the Russian Federation had expropriated their investments in Yukos Oil Company. In a 2009 decision, the arbitrators found that they had jurisdiction over the dispute, and in a 2012 award, the tribunal ruled in favour of the fund companies.

In parallel to the arbitration proceedings, the Russian Federation had requested a court ruling that the arbitrators lacked jurisdiction. This was possible under the Act at this time.[29] The Svea Court of Appeal found that the tribunal lacked jurisdiction. Its judgment on jurisdiction was rendered in 2016, i.e., after the arbitration award holding the Russian Federation liable under the treaty was handed down.

The Russian Federation challenged the arbitration award. In the challenge proceedings, the Svea Court of Appeal found that the issue of jurisdiction had been finally resolved by its 2016 judgment on jurisdiction. Since such judgment would have been binding for the arbitration tribunal if it had been rendered prior to the arbitration award, it should determine the jurisdictional issue also in the challenge proceedings.

27. This has now been codified in the amendments to the Act that entered into force on 1 Mar. 2019.
28. Judgment by Svea Court of Appeal on 7 Jun. 2018 in Case No. T 9294-12.
29. Section 2 of the Act provided that the 'arbitrators may rule on their own jurisdiction to decide the dispute,' adding, however, that this shall 'not prevent a court from determining such a question at the request of a party'. A changed regime has been implemented as of 1 Mar. 2019.

Accordingly, the arbitration award was set aside on the basis that the arbitrators lacked jurisdiction to handle the dispute.

The Court of Appeal did not grant leave to appeal to the Supreme Court.

[G] *Norse Hotels v. Accor*

In *Norse Hotels v. Accor,*[30] the parties (both Swedish) had entered into a franchise agreement which subsequently was terminated by both parties, with Accor initiating arbitration and requesting *inter alia* damages/liquidated damages/contractual penalties. The arbitration tribunal awarded Accor liquidated damages and contractual penalties in the amount of some SEK 36 million. Norse challenged the award on several alternative grounds, none of which was successful. However, one of these grounds will nevertheless be addressed here since it can be presumed to be of some interest in light of the much-discussed *Yukos* case.

The parties had agreed to the arbitration tribunal appointing an administrative secretary. Norse alleged that the tribunal, in violation of the parties' instructions and the arbitrators' mandates, had used the administrative secretary not only for purely administrative tasks but also for substantive legal work, such as preparing draft recitals and draft procedural decisions, and reviewing the grounds and evidentiary themes invoked by the parties. According to Norse, this constituted an excess of mandate or at least a procedural error which probably affected the outcome of the case. Specifically, Norse claimed that large parts of its case were not accounted for in the recitals, with the result that the tribunal had not taken note thereof. Had the work not been delegated to the administrative secretary that would not have been the case Norse argued.

Both the chairman of the tribunal and the administrative secretary gave evidence in the Court of Appeal. The administrative secretary testified that she participated in drafting the recitals by including therein, based on the chairman's guidance, the parts of the written submissions considered relevant. The chairman reviewed the document, gave instructions and worked on the text himself, according to the testimony by the administrative secretary. The chairman testified that he had had full control over all documents and that all work performed by the administrative secretary had been under his leadership and subject to his control.

The Court of Appeal found that the instructions given to the arbitration tribunal, namely that the parties expected the arbitrators to prepare (Sw. '*upprätta*') the recitals, procedural decisions, etc., did not mean that the administrative secretary was prevented from participating in the drafting of the recitals in the manner she did. The expression 'prepare' must be understood to refer to the final version of the document. It had been shown, the Court of Appeal stated, that the tribunal did not delegate to the administrative secretary the responsibility for the final version of the recitals. Nor was there any evidence to show that the work performed by her affected the decisions made by the arbitrators. Instead, such work seemed, according to the Court of Appeal, to be in line with what is customary in arbitration proceedings where an administrative

30. Judgment by the Svea Court of Appeal on 24 Nov. 2017 in Case No. T 10896-16.

secretary is appointed. Accordingly, there was no excess of mandate and no procedural error.

The Court of Appeal did not grant leave to appeal to the Supreme Court.

§1.04 ENFORCEMENT CASES

[A] Introduction

As a main rule, a foreign arbitration award that is based on an arbitration agreement shall be recognized and enforced in Sweden (section 53 of the Act). The following sections of the Act identify exceptions from the main rule, including various procedural deficiencies (section 54) and non-arbitrability and ordre public (section 55).[31] The Svea Court of Appeal is the exclusive first instance forum to apply for recognition and enforcement (section 56). Its decisions can be appealed to the Supreme Court (section 59).

In 2018, the Supreme Court rendered three awards in enforcement cases.

[B] *Belaya Ptitsa v. Robot Grader*

In *Belaya Ptitsa v. Robot Grader*, NJA 2018 p. 291, the parties (Russian and Swedish) had entered into an agreement whereby Robot Grader should perform work for Belaya Ptitsa in Russia. The agreement provided that disputes be settled by the international arbitration court at the Russian Chamber of Commerce (ICAC).

Belaya Ptitsa initiated arbitration in May 2015. On 6 July, ICAC ordered Robot Grader to appoint an arbitrator within fifteen days and to submit a statement of defence within thirty days. Robot Grader appointed an arbitrator but did not submit a statement of defence. On 23 September the arbitration tribunal convened a hearing for 19 November. Robot Grader was again ordered to submit a statement of defence and to do so not later than 1 November. Robot Grader did not submit any statement of defence. At the start of the hearing on 19 November, the parties explained that it was their intention to settle. At the joint request of the parties the hearing was postponed until 11 December. At the start of the hearing on 11 December, the parties presented a settlement agreement. However, the arbitration tribunal did not consider such agreement to be a settlement of the dispute before it; it concerned other issues. The parties then jointly requested that the hearing be postponed so that the settlement agreement could be adjusted. The arbitration tribunal decided that the hearing should be held on 24 December. On 24 December the parties jointly requested that the hearing again be postponed. The arbitration tribunal decided that the hearing should be held on 5 February 2016. At the outset of the 5 February hearing, the parties announced that they had not been able to settle. Belaya Ptitsa requested that the tribunal should proceed to decide the dispute while Robot Grader asked for a postponement so that it could

31. The public policy exception refers to awards that are found to be '… clearly incompatible with the basic principles of the Swedish legal system …'.

prepare its case. The arbitration tribunal rejected Robot Grader's request for postponement, stating that Robot Grader had sufficient time to prepare its case and the arbitration tribunal noted specifically that no statement of defence had been submitted. On 25 March the arbitration tribunal rendered an award whereby Robot Grader was ordered to pay EUR 324,000 to Belaya Ptitsa.

Belaya Ptitsa applied to the Svea Court of Appeal for recognition and enforcement of the award. Robot Grader opposed enforcement, arguing that it, due to the arbitration tribunal's handling of the arbitration, had been unable to present its case. The Court of Appeal rejected the enforcement application. Belaya Ptitsa appealed to the Supreme Court.

The Supreme Court noted that a foreign arbitral award shall not be recognized and enforced in Sweden where the party against whom the award is invoked proves that it has been unable to present its case (section 54, item 2). The Supreme Court further noted that this provision corresponds to Article V 1(b) of the New York Convention. Neither the Convention nor the *travaux preparatories* to the Act gives any guidance as to how to understand the provision. However, the Supreme Court stated, it is clear that for recognition and enforcement to be refused, there must have been a deviation from fundamental principles of the rule of law (Sw. '*rättssäkerhetsgarantier*') in international arbitration. The parties, the Supreme Court stated, must be ensured due process before the arbitration tribunal. One fundamental aspect in that regard is that each party shall be given the full opportunity to present its case.[32] This means, *inter alia*, stated the Supreme Court, that the party shall be given time and opportunity to do so, adding that what is required is to a high degree dependent on the specific circumstances of the case.

As to the case at hand, the Supreme Court noted that Robot Grader was twice ordered to submit a written statement of defence without complying. In the time prior to the first hearing, 19 November 2015, the arbitration tribunal therefore could have had reason to conclude that Robot Grader would not loyally take part in the proceedings. Under those circumstances, the tribunal was not prevented from continuing the proceedings with a view to deciding the case.

However, at the first hearing, the parties jointly announced that they intended to settle the case and requested, then and on two further occasions, that the hearing be postponed. That changed the circumstances of the proceedings, according to the Supreme Court. By their actions, the parties demonstrated that they were seeking an amicable solution, without the arbitration tribunal having to decide the dispute. In that situation there was no longer any reason for Robot Grader to submit a written statement of defence, nor did the arbitration tribunal return to that issue. It was not until the fourth hearing that it became clear that no amicable solution could be reached. Until then Robot Grader had reasons to assume that the dispute would not be tried by the arbitration tribunal in that hearing. When Belaya Ptitsa requested that the tribunal decide the case, circumstances changed once again. Therefore, the arbitration tribunal should have given Robot Grader sufficient time to prepare its case and invoke evidence.

32. In this connection the Supreme Court refers to the UNCITRAL Model Law, Article 18, the UNCITRAL Arbitration Rules, Article 17 and section 24 of the Act.

The Supreme Court concluded that the arbitration tribunal had disregarded a fundamental principle of due process in international arbitration, with the result that Robot Grader had not been able to present its case. Therefore, and regardless of the fact that Robot Grader had unsuccessfully challenged the award in Russia, the award should not be recognized and enforced in Sweden.

[C] *Adelina Gross v. Promlinus*

In *Adelina Gross v. Promlinus*, NJA 2018 p. 504 ('The Serbian arbitration award'), the parties (Swedish and Serbian) had entered into a reseller agreement whereby Adelina Gross had the exclusive right to sell Promlinus' products on the Scandinavian market. The agreement provided that disputes be settled by arbitration.

In February 2014, Promlinus initiated arbitration with the arbitration court at the Serbian chamber of commerce in Belgrade. Adelina Gross was requested to submit a statement of defence and to jointly with Promlinus appoint an arbitrator, alternatively to let the arbitration court appoint the arbitrator. Adelina Gross did not submit a statement of defence. Nor did it act with regard to the appointment of an arbitrator. The arbitration court appointed an arbitrator and informed the parties accordingly, with none of the parties objecting. The arbitrator found that he had jurisdiction since there was an applicable arbitration agreement and since Adelina Gross had not objected to his jurisdiction. Adelina Gross did not appear at the hearing and was not heard from in any other manner during the proceedings. By final award in March 2015, Adelina Gross was ordered to pay some EUR 30,000 to Promlinus.

In July 2015 Promlinus applied to the Svea Court of Appeal for enforcement of the award. Adelina Gross objected arguing that the arbitration court at the Serbian chamber of commerce had lacked jurisdiction. According to Adelina Gross, the arbitration agreement between the parties entailed that disputes be settled by ad hoc arbitration in accordance with the Serbian Arbitration Act. Therefore, the composition of the arbitration tribunal and the proceedings that had been carried out did not comply with the arbitration agreement.

The Svea Court of Appeal granted the application for enforcement. Adelina Gross appealed to the Supreme Court.

The Supreme Court noted that the main rule is that a foreign arbitral award based on an arbitration agreement shall be recognized and enforced in Sweden (section 53 of the Act). Section 54 sets out certain exceptions to the main rule. One of those exceptions (item 4) is when the party against whom the award is invoked proves that the appointment of the arbitration tribunal or its composition or the arbitral procedure was not in accordance with the agreement of the parties or, in the absence of such agreement, was not in accordance with the law of the country where the arbitration took place.

The Supreme Court further noted that section 54 of the Act is intended to conform to Article V(1) of the New York Convention and that the Convention's purpose to facilitate enforcement shall be taken into account when deciding enforcement cases, as shall international case law and the principles enshrined in the UNCITRAL Model Law.

The Supreme Court went on to note that neither section 54 of the Act nor the New York Convention has any explicit rule setting out the effects of a party's passivity in arbitration proceedings. However, the Convention is considered to include a principle that a party as a defence in enforcement proceedings cannot invoke circumstances known to him and in relation to which no objection was made during the arbitration proceedings.[33] In a similar manner, the Supreme Court stated, the Act (section 34) and the UNCITRAL Model Law (Article 4) include provisions that passivity can lead to the loss of right to challenge the award. Also the Serbian Arbitration Act includes such rule (section 43).

Moreover, the Supreme Court noted, there are numerous decisions from various jurisdictions where courts, without an explicit rule to that effect, have denied objections to enforcement on the basis of the passivity of the objecting party. In that context it has been stated, the Supreme Court noted, that parties cannot wait with objecting to the tribunal's jurisdiction until after the case has been lost. Also, a party cannot make objections to the composition of the tribunal not made in the arbitration proceedings.[34]

The Supreme Court concluded that a party, due to passivity in the course of the arbitration proceedings, can lose the right to invoke a circumstance which according to him constitutes an obstacle to enforcement.

With regard to the case at hand, the Supreme Court found that Adelina Gross, after having been notified of the proceedings and the appointment of an arbitrator, had not objected to the jurisdiction of the arbitration court or the arbitrator or made any other objection whatsoever. Therefore, Adelina Gross had lost the right to invoke the circumstances on which it based its objections in the enforcement proceedings.

[D] *JO v. Smart Board*

In *JO v. Smart Board*, NJA 2018 p. 323 ('The Norwegian Arbitration Award'), JO and Smart Board (both Swedish) had an agreement whereby JO produced so-called MDF panels for Smart Board in Sweden. The agreement included a non-compete clause according to which JO for a period of two years after expiry of the agreement could not compete with Smart Board with regard to MDF panels. When the agreement between JO and Smart Board expired on 31 December 2015, JO leased his production equipment to another company which used it to produce MDF panels.

Smart Board initiated arbitration under the arbitration clause in its agreement with JO. In January 2017, an arbitration award was rendered in Norway. With reference to the non-compete clause the arbitration tribunal ordered JO not to compete with Smart Board in respect of MDF panels until 31 December 2017 (the prohibition order), to pay damages in the amount of NOK 4 million for having not complied with

33. Here, reference was made to Albert Jan van den Berg, The New York Arbitration Convention of 1958, 1981, pp. 185 and 266, and to Marike Paulsson, The 1958 New York Convention in Action, 2016, pp. 162 et seq.
34. Here, reference was made to the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 2016 edition, pp. 187-204, and to Born, pp. 3537 et seq and p. 3585.

the non-compete clause, and to compensate Smart Board for costs incurred by it in the arbitration proceedings. No competition law issues were addressed in the award, and JO had not made any arguments based on competition law.

When Smart Board applied to the Svea Court of Appeal for enforcement of the award in Sweden, JO objected, arguing, *inter alia*, that the award contravened Chapter 2, section 1 of the Swedish Competition Act, which provides as follows:

> Agreements between undertakings shall be prohibited if they have as their object or effect, the prevention, restriction or distortion of competition in the market to an appreciable extent, if not otherwise regulated in this act.

The Svea Court of Appeal granted Smart Board's application, providing very summary reasons in respect of JO's competition law based objection. JO appealed to the Supreme Court.

Before proceeding to the Supreme Court's reasoning, a few words should be said about how the Act defines arbitrability generally and about the reference to arbitrability of competition law issues included in the Act. First, the general arbitrability rule (section 1, subsection 1) provides that arbitrators may deal with 'disputes concerning matters in respect of which the parties may reach a settlement'. These are often referred to as 'dispostive disputes' – i.e., disputes that the parties may settle, in contrast to 'indisposive' disputes. With regard specifically to competition law, subsection 3 of section 1 provides that 'arbitrators may rule on the civil law effects of competition law as between the parties.'

Returning to the Supreme Court's judgment, the court started by noting that both the prohibition order in the arbitration award and the damages awarded therein were based on the non-compete clause and that it was JO's activities in Sweden that had been assessed by the arbitration tribunal. Therefore, the Supreme Court found, the issue whether the non-compete clause was binding for JO is subject to mandatory Swedish competition law (including EU law which in principle is identical to domestic Swedish competition law).

The Supreme Court went on to note that section 55 of the Act contains two enforcement obstacles. The first is if the award determines an issue which may not be decided by arbitrators (item 1), with the second being that it would be clearly incompatible with basic principles of the Swedish legal system to enforce the award, i.e., ordre public (item 2). The Supreme Court noted that almost identical grounds for invalidity of Swedish awards are set out in section 33 of the Act, adding that there is no reason to attribute a different meaning to the enforcement obstacles in section 55 than to the invalidity grounds in section 33.

Referring to section 1 of the Act, the Supreme Court found that the specific competition law provision in paragraph 3 comes into play only when the disputed issue is not arbitrable according to paragraph 1. If the dispute is capable of being settled when the arbitration award is rendered, then it is arbitrable pursuant to paragraph 1. If so, there is no invalidity pursuant to section 33 item 1, nor any enforcement obstacle pursuant to section 55 item 1.

The fact that the parties may not settle a competition law dispute does not exclude jurisdiction for the tribunal, namely if the dispute concerns civil law effects of competition law as between the parties. However, the award may nevertheless be incompatible with basic principles of the Swedish legal system in the meaning of section 33 item 2 and section 55 item 2. That is normally the case when the award orders or upholds a course of action which is not allowed under competition law. According to the Supreme Court, this means that the reservations normally observed when applying section 33 item 2 and section 55 item 2 shall not be upheld when the compatibility of an arbitration award with mandatory competition law is called into question. With regard thereto, the court shall act so that arbitration awards as far as possible are final, while not encroaching to a considerable degree (Sw. '*beaktansvärd grad*') on the overriding interest of upholding mandatory competition law. It must be established that competition law has been infringed but the infringement need not be grave (Sw. '*något större krav på kränkningens allvar bör inte ställas*').[35]

In the case at hand, the arbitration tribunal had not addressed the issue of compatibility of the non-compete clause with competition law. The Supreme Court found that this did not prevent it from making an assessment under section 55 item 1 of the Act.

The Supreme Court also found that the three different parts of the award, the prohibition order, the damages and the cost order, should be examined individually. The result, therefore, may become that the foreign award is partially enforceable, although this is not explicitly set out in section 55 (unlike in section 33).

With regard to *the prohibition order*, the Supreme Court reasoned as follows. The Competition Act is mandatory in the sense that a party cannot agree to not compete in violation of the Act. The prohibition order in the arbitration award was based on the non-compete clause which includes a forward-looking prohibition. The arbitration tribunal's assessment resulting in the prohibition order concerned an issue that cannot be settled by the parties and therefore is not arbitrable pursuant to section 1, subsection 1 of the Act. The Supreme Court again noted that certain competition law issues might be tried by arbitrators despite not being arbitrable (section 1, subsection 3) and found that the binding effect for the future of non-compete clauses concerned 'the civil law effects of competition law'. Therefore, the arbitration tribunal was entitled under section 1, subsection 3, to determine the prohibition issue. This, in turn, meant that there was no enforcement obstacle under section 55 item 1 of the Act with regard to the prohibition order.

It follows from case law (NJA 2015 p. 438) that a court shall make a substantive assessment of the competition law issue when the jurisdiction of the arbitration tribunal was based on section 1, subsection 3 of the Act. When, as here (and unlike NJA 2015 p. 438), the arbitration tribunal had not taken competition law into account when deciding the case, the court must make its own independent assessment thereof.

The overriding purpose of the ordre public provisions in section 33 item 2 and section 55 item 2 of the Act is that courts shall not take part in the enforcement of an award where it would be highly inappropriate to do so (Sw. '*höggradigt stötande*'). However, with regard to mandatory competition law, the examination must be more

35. The Supreme Court noted that further considerations need to be made when EU competition law is applicable and referred in this regard to its judgment in NJA 2015 p. 438.

concrete and far-reaching than what generally is the case when applying the ordre public provision. The task is to prevent arbitration awards being upheld which to a considerable degree (Sw. '*beaktansvärd grad*') violate a mandatory competition law provision. Therefore, courts shall apply the principles used in indispositive competition law disputes between private parties, including not limiting itself to the facts and circumstances invoked by the parties (Sw. '*officialprövning*').

In the present case, the Supreme Court found that the Court of Appeal's review of the competition law issues did not satisfy the requirements laid down by the Supreme Court. Normally that would have resulted in the case being returned to the Court of Appeal. However, at the time of the Supreme Court's review in 2018, the prohibition order no longer applied; it had expired by the end of 2017. Therefore, there was no point in requesting the Svea Court of Appeal to review the case in accordance with the Supreme Court's guidance. Because the prohibition order no longer was relevant, the Supreme Court did not deal with the dispositive part of the arbitration award in that regard.

When it came to the *damages* awarded by the arbitration tribunal, the Supreme Court found that the award could be enforced. First, the Supreme Court noted that parties may normally settle disputes that are not lawful under competition law as long as the settlement does not cover future conduct. In other words, such disputes are arbitrable pursuant to the general arbitrability provision in section 1, paragraph 1 of the Act. In the context of an assessment under section 33 item 1 or section 55 item 1, the Supreme Court found that the circumstances *at the time of rendering the arbitration award* determine if the dispute is capable of being settled. If the dispute could be settled at that time, there is no invalidity and no enforcement obstacle under such provisions.

However, with regard to the application of section 33 item 2 and section 55 item 2, i.e., when the issue is if an award upholding a non-compete clause is compatible with ordre public, the relevant time can be a time other than when the award was rendered. In that regard, the Supreme Court found that the relevant time for assessing if the clause was unlawful from a competition law point of view and therefore not compatible with basic principles of the Swedish legal system was when the *objection* based on competition law was first made. Thus, the arbitration award shall be scrutinized by courts from a competition law point of view under sections 33 item 2 and 55 item 2 only with regard to damages awarded for the time after the objection (but not prior thereto). Upholding mandatory competition law requires no more than that court scrutiny under sections 33 item 2 and 55 item 2 secures the right for a party to oppose *further* damages. In the case at hand, JO had not objected based on competition law until the enforcement proceedings before the Svea Court of Appeal. Accordingly, there was no obstacle under section 55 item 2 to the enforcement of the award with regard to damages. Two dissenting justices (of five) did not agree with the majority when it came to the relevance of the timing of the competition law objection and wanted the case to be referred back to the Svea Court of Appeal for assessment as to whether the damages awarded violated competition law.

§1.05 ARBITRATORS' FEES

Section 41 of the Act provides that a party or an arbitrator may bring an action in the district court against an arbitral award regarding payment of compensation to the arbitrators. In ad hoc arbitration, the arbitrators themselves determine fees and expenses, whereas in institutional arbitration fees and expenses are typically set by the relevant institution.

The Swedish Supreme Court in NJA 2008 p. 1118 ruled that section 41 of the Act applies also to cost decisions by arbitration institutions which in one form or another are included in the dispositive part of the award.

A well-known Swedish scholar, specialized in intellectual property law, was appointed co-arbitrator in a dispute between a company (BIM) in the Swedish media group Bonnier and Australian Media Properties (AMP). AMP was a licensee under a licence agreement with BIM. In 2013 AMP initiated arbitration and made claims for damages. BIM disputed the claim, sought payment for unpaid licence fees and appointed as co-arbitrator the Swedish scholar. The arbitration proceedings were conducted under the SCC Rules. In an award in April 2014, BIM's claims were granted and AMP's claims were denied.

AMP challenged the award in the Svea Court of Appeal, alleging *inter alia* that the scholar was not impartial due to prior assignments from the Bonnier group. In parallel, AMP sued the scholar at the Stockholm District Court claiming that the fees granted to him in the award should be annulled or at least reduced on the basis that he was not qualified to act as co-arbitrator due to lack of impartiality. The fee case was stayed awaiting the outcome of the challenge procedure in the Svea Court of Appeal.

In April 2016 the Court of Appeal rejected the challenge. Despite this, AMP did not withdraw its claim in the fee proceedings. Both the Stockholm District Court and, on appeal, the Svea Court of Appeal rejected the claim to eliminate or reduce the fee awarded to the scholar.[36]

In the author's opinion, it was obvious that AMP would not succeed in the fee case after the Svea Court of Appeal, in the challenge procedure, having found that there was no lack of impartiality on the part of the scholar. The reason why the fee case is nevertheless discussed in this chapter is because of the reasons given by the Svea Court of Appeal for its ruling.

As mentioned, the fee to the scholar had been determined by the SCC on the basis of the cost schedule included in its rules. According to the SCC Rules, the amount in dispute is determinative for the arbitrators' fees.

The Court of Appeal noted that also cost decisions made by institutions, in this case the SCC, can be appealed pursuant to section 41 of the Act if such decisions in one form or the other have been included in the dispositive part of the award (NJA 2008 p. 1118). However, the Court of Appeal found that section 41 of the Act shall be applied differently depending on whether the cost decision is made by the arbitrators themselves or by an institution. The Court of Appeal's reasoning is based on what Former

36. Judgment by the Stockholm District Court on 19 Jun. 2017 in Case No. T 10361-14 and judgment by the Svea Court of Appeal on 16 Oct. 2018 in Case No. T 6862-17.

Chief Justice Lindskog states in his commentary to the Act. According to Lindskog, when the fees are determined by the arbitrators, the court is free to assess the reasonableness of the fees when applying section 41 of the Act. However, when costs are set by an institution, and therefore pursuant to rules chosen by the parties, then the cost decision is binding on the parties as if they themselves had agreed the amounts in question. Therefore, such cost decisions may be changed only if this follows from general principles of contract law (Sw. '*allmänna avtalsrättsliga principer*'), in which case application of section 36 of the Swedish Contracts Act is the primary instrument for amendments pursuant to which unreasonable contract terms may in exceptional circumstances be adjusted or set aside. To the author's understanding, the Court of Appeal fully embraced this latter line of reasoning in the case now discussed.