CHAPTER 1

Swedish Arbitration-Related Case Law 2019–2020

Christer Danielsson

§1.01 INTRODUCTION

This chapter will account for court cases relevant to arbitration law from Swedish appellate courts for the period 1 May 2019–30 April 2020.[1] 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[2] (the 'Act') applies to all arbitration proceedings seated in Sweden, whether the parties have any connection to Sweden or not.[3] The Act also sets out the requirements for foreign arbitral awards to be recognized and enforced in Sweden.[4]

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 Court of Appeal is the 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. The Supreme Court has not decided any arbitration related cases in the period covered herein.
2. Lagen (1999:116) om skiljeförfarande.
3. The Act, section 46.
4. The Act, sections 52 et seq.

which it came about, is clearly incompatible with the basic principles of the Swedish legal system, i.e., ordre public.[5]

An arbitral award 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.[6]

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.[7] The Court of Appeal's permission is required in order to appeal its judgment.[8] 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.[9]

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.[10] In the period covered by this chapter, no award was declared invalid or set aside.

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

As reported in the 2019 Stockholm Arbitration Yearbook,[11] the Svea Court of Appeal in February 2019 rendered a judgment in a case similar to *Achmea,*[12] *the Republic of Poland v. PL Holdings S.a.r.l.* ('PL Holdings').[13] The Court of Appeals' judgment was appealed to the Supreme Court. The Supreme Court granted leave. On 4 February 2020, the Supreme Court decided to request a preliminary ruling from the Court of Justice of the European Union (CJEU).

In summary (for further detail, *see* the 2019 Stockholm Arbitration Yearbook) the facts are the following.

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 party to

5. The Act, section 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.
6. The Act, section 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.
7. The Act, section 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.
8. The Act, section 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'.
9. The Act, section 43(2). Such requirement was introduced in an amendment to the Act which entered into force on 1 Mar. 2019.
10. Översyn av lagen om skiljeförfarande ('Review of the arbitration act'), SOU 2015:37, p. 81.
11. Stockholm Arbitration Yearbook 2019, pp. 9 et seq.
12. Judgment by the European Court of Justice of 6 Mar. 2018, *Slovak Republic v. Achmea BV*, Case No. C-284/16.
13. Judgment by the Svea Court of Appeal dated 22 Feb. 2019 in Case Nos T 8538-17 and T 12033-7.

the treaty have the right to initiate arbitration proceedings in accordance with three different options, one of which is the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules). Thus, the Investment Treaty is an intra-EU (European Union) bilateral investment treaty.

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

In June 2017, the arbitration 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 arbitration tribunal ordered Poland to pay substantial damages (approx. EUR 150 million).

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 the meaning 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 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.

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 of 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

14. The Treaty on the Functioning of the European Union.

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 did not do.

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.

As noted, the Supreme Court has now requested a preliminary ruling from the CJEU. In its decision the Supreme Court stated the following under the heading 'The need for a preliminary ruling':[15]

> The question is what the implications of the principles elaborated by the CJEU in *Achmea* have for the outcome of the case before the Supreme Court.
>
> It is clear that the provision regarding dispute resolution in the investment agreement of relevance in this case before the Supreme Court is invalid. Thus, a possible conclusion is that the standing offer to initiate arbitration proceedings, which the state can be said to have extended to an investor through the dispute resolution provision, is also invalid, considering that the offer is closely linked to the investment agreement.
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> In the case before the Supreme Court, it has also been argued that the situation is different in this case since it is the request for arbitration that constitutes an offer. The state would then, as a result of its freely expressed wishes, expressly or tacitly, be able to accept the jurisdiction of the arbitral tribunal, in accordance with the principles explained by the CJEU with regard to commercial arbitration.
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> The Supreme Court does not consider it to be clear, or clarified, how EU law shall be interpreted with regard to the issues that arise in this case. Therefore, there are reasons for requesting a preliminary ruling from the CJEU in order to avoid the risk of an incorrect interpretation of EU law.

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

> Do Articles 267 and 344 TFEU, as interpreted in *Achmea*, mean that an arbitration agreement is invalid if it has been entered into by a member state and an investor – when there is an arbitration clause in an investment treaty which is invalid because the treaty was entered into by two member states – when the member State, after the investor having requested arbitration, as a result of the state's free will refrain from objecting to jurisdiction?

§1.04 *PUBLIC JOINT STOCK COMPANY GAZPROM V. NATIONAL JOINT STOCK COMPANY NAFTOGAZ OF UKRAINE*

An SCC arbitration tribunal seated in Stockholm issued three awards in 2017 and 2018 relating to disputes over long-term gas supply and transit contracts entered into in 2009 between Gazprom and Naftogaz, an oil and gas company wholly owned by the state of

15. Decision by the Supreme Court 21 Feb. 2020 in Case No. 1568-19.

Ukraine. The value in dispute was in excess of USD 100 billion, making it the largest known commercial arbitration ever.

Gazprom applied to the Svea Court of Appeal to set aside all three awards.

In November 2019, the Court of Appeal rendered judgment in relation to the claim to set aside one of these, a separate award in the supply dispute.[16] Gazprom argued that the tribunal had committed several errors that qualified as excess of mandate or as an irregularity in the course of the proceedings which probably influenced the outcome of the case. The alleged errors were that the tribunal had exceeded the framework of the dispute as laid down by the parties, that the tribunal had failed to inform the parties that it intended to go down a certain path in the interim award, and that the tribunal's reasons for its findings were incomplete. The Court of Appeal found that there was no merit to any of the allegations made by Gazprom and rejected the challenge.

At the time of the Court of Appeals' judgment the two other challenges (against the final award in the supply dispute and the final award in the transit dispute) were pending. With regard to the award in the transit dispute Gazprom *inter alia* alleged that a substantial part of the tribunal's reasons had been drafted by its administrative secretary.

However, neither this nor any other allegation made by Gazprom in the two pending challenges were examined by the Court of Appeal since Gazprom and Naftogaz in December 2019 entered into a comprehensive settlement covering these and other disputes between the parties.

§1.05 *REPUBLIC OF LITHUANIA V. OAO GAZPROM*

AB Lietuvos Dujos is a Lithuanian gas company that originally was wholly owned by the Republic of Lithuania. In the 1990s the company was partially privatized when E.ON bought part of the shares. In a second stage of privatization, Gazprom bought into the company in 2004. In connection therewith Lithuania and Gazprom entered into a Share Sale and Purchase Agreement (SPA). Together with E.ON, Gazprom and Lithuania also concluded a Shareholders Agreement (SHA). Also, Gazprom and AB Lietuvos Dujos were parties to a Gas Supply Agreement (GSA) since 1999.

The purpose of the SPA was to govern Lithuania's sale of shares to Gazprom. However, some provisions in the SPA were aimed at Gazprom's existing obligation to deliver gas to AB Lietuvos Dujos, including a provision (Article 7.4.1) pursuant to which Gazprom for a ten-year period undertook to deliver gas at reasonable prices. The GSA was amended accordingly.

In 2012, Lithuania requested arbitration under the SCC Rules against Gazprom, referring both to the SPA and the SHA. According to the claimant, Gazprom had abused its double roles as both shareholder and supplier and had delivered gas to AB Lietuvos Dujos at prices which were not reasonable. Lithuania sought both monetary and declaratory relief. In 2016 the arbitral tribunal rejected the claims.

16. Judgment by the Svea Court of Appeal dated 27 Nov. 2019 in Case No. T 10191-17.

Lithuania initiated proceedings before the Svea Court of Appeal to have the arbitral award declared invalid or set aside. All claims were rejected in a judgment in 2019.[17]

Several grounds for setting aside the award were invoked by Lithuania. Here, focus will be on the claim that the award should be declared invalid pursuant to section 33 of the Act.

According to Lithuania, the tribunal had an obligation to take into account what constitutes a reasonable price under EU competition law when assessing the pricing under Article 7.4.1 of the SPA. The tribunal did not do so. Moreover, as a separate ground for invalidity Lithuania argued that the consequence of the tribunal's failure to take EU competition law into account was that the award upheld gas prices that violated EU competition law. For these reasons, the award and the manner in which it came about was clearly incompatible with the basic principles of the Swedish legal system, i.e., in violation of ordre public.

Gazprom's primary objection was that the dispute before the tribunal was of no competition law relevance which according to Gazprom meant that the arbitrators were under no obligation to take into account EU competition law.

In order to determine if the arbitrated dispute was of relevance from a competition law perspective the Court of Appeal analysed the requests for relief sought by Lithuania and the grounds invoked in support thereof. The Court of Appeal concluded that none of the reliefs sought was aimed at imposing or upholding any violation of competition law. Instead, the requests for relief concerned compensation due to Gazprom having violated the SPA and the SHA, and declaratory relief that Gazprom had violated such agreements.

The Court of Appeal noted that it was common ground between the parties that Lithuania in the arbitration proceedings had not, as an independent ground, invoked that the SPA and the SHA violated EU competition law. Moreover, it had not been demonstrated, the Court of Appeal found that Lithuania had based its claims on circumstances that made the dispute competition law relevant.

The Court of Appeal concluded that the dispute before the tribunal had been purely contractual in nature which meant that the tribunal, having jurisdiction under section 1(1) of the Act,[18] was under no obligation to take into account what constituted a reasonable price according to EU competition law, as alleged by Gazprom. Nor, added the Court of Appeal, did the award uphold gas prices that violated EU competition law or were otherwise in conflict with such rules.

Consequently, there was no violation of ordre public, and since Lithuania also failed with respect to its set-aside motions the arbitral award was upheld.

The Court of Appeal gave permission to appeal its judgment to the Supreme Court. As noted above, this is rare. The Republic appealed, but the Supreme Court did not grant leave.

17. Judgment by the Svea Court of Appeal on 4 Jul. 2019 in Case No. T 7931-16.
18. 'Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution'.

§1.06 *CORALINE LIMITED V. WALTER HÖFT*

In a 2015 SCC award Cypriot company Coraline had been ordered to pay EUR 9.2 million to Walter Höft, a German national. In the arbitration, Mr Höft's case was that he had personally lent more than EUR 12 million to Coraline under a loan agreement and was now requesting repayment.

Coraline initiated proceedings before the Svea Court of Appeal in 2017. In such proceedings Coraline requested that the 2015 award be set aside on three separate grounds, only one of which will be discussed here. The Court of Appeal rendered its judgment in December 2019, rejecting all grounds for appeal and thus upholding the arbitral award.[19] Leave to appeal to the Supreme Court was not given by the Court of Appeal.

The loan agreement under which Coraline was ordered to repay Walter Höft contained two dispute resolution clauses.

Article 9: 'This agreement shall be governed by and interpreted in accordance with the laws of Cyprus and the parties hereby agree that all actions or proceedings arising hereunder, or in connection with this agreement shall be brought in first instance before the competent court in Nicosia, Cyprus.'

Article 6: 'All disputes and differences which may arise out of the present Agreement or in connection with the same are to bet settled by the parties in an amicable way to the maximum possible extent. Should the parties fail to reach an agreement a case shall be submitted, without recourse to courts of law, to the International arbitration court in Stockholm with the rules for procedure of the said court.'

Before the Court of Appeal Coraline argued that the tribunal had lacked jurisdiction to hear the case since the parties had agreed on the exclusive competence of a Cypriotic court and since there was no agreement between the parties which unambiguously stated that they had decided to settle disputes by way of arbitration instead of in court. According to Coraline, this issue should be decided by application of Cypriotic law, alternatively by Swedish law. Since there was no valid arbitration agreement under either law the 2015 award should be set aside.

Walter Höft argued that the validity of the arbitration clause should be assessed under Swedish law. According to him, at the time of entering into the loan agreement the parties had the joint will that disputes should be resolved by arbitration, and under Swedish law the joint will take precedence even over the wording of the agreement.

The Court of Appeal started by referring to a statement made by the Supreme Court in the well-known 2019 *Belgor* case[20] according to which courts in set-aside proceedings, when assessing jurisdiction, shall take into account that the tribunal typically is best suited to determine jurisdiction. For this reason, as explained by the Supreme Court, the starting point for a court in set-aside proceedings shall be that the arbitration tribunal's interpretation and assessment of evidence are correct.

19. Judgment by the Svea Court of Appeal on 19 Dec. 2019 in Case No. T 7929-17.
20. Judgment by the Supreme Court 20 Mar. 2019 in Case No. T 5437-17, *see* the 2019 Stockholm Arbitration Yearbook, pp. 2 et seq.

With regard to applicable law to the arbitration agreement, the arbitration tribunal had found that Swedish law applied and that Article 6 of the loan agreement constituted a valid arbitration agreement.

The Court of Appeal started its assessment by noting that the arbitration agreement constituted an agreement separate from the main agreement (as provided in section 3 of the Act).

The Court of Appeal went on to note that if parties have not made a choice of the law applicable to the arbitration agreement section 48 of the Act provides that the law at the seat shall apply. The choice of the parties must explicitly point to the arbitration agreement – a general choice of law clause is not enough.

The Court of Appeal found that the only provision in the loan agreement which contained any choice of law element was Article 9. However, the Court of Appeal concluded that the reference to Cypriotic law in this provision does not specifically aim at the choice of law for the arbitration agreement. Instead, as drafted section 9 indicates that it refers to the choice of law for the main agreement. Therefore, there is no provision in the loan agreement which specifically deals with the choice of law for the arbitration agreement. Accordingly, Swedish law shall apply as provided in section 48 of the Act.

In the Court of Appeal's opinion Article 6 of the loan agreement contained what, under Swedish law, must be deemed to be an arbitration agreement. The Court of Appeal acknowledged that Article 9 contains a different dispute resolution clause, pointing to a court in Cyprus. 'However', the Court of Appeal stated, 'the content of Article 9 gives no guidance with regard to the interpretation of the arbitration clause in Article 6'.

The loan agreement had been signed by Walter Höft and by Elpida Papastylianou for Coraline, both testified in the set-aside proceedings. Ms Papastylianou stated that she had inserted an arbitration clause in the agreement because Mr Höft wanted disputes to be settled by arbitration. Both Ms Papastylianou and Mr Höft further testified that Article 9 remained in the loan agreement because of an oversight.

The Court of Appeal concluded, taking all circumstances into account, that it had been demonstrated that the parties had a joint will to settle disputes by way of arbitration and that they had entered into an arbitration agreement which did not contain any specific limitations.

§1.07 *REPUBLIC OF KAZAKHSTAN V. ASCOM GROUP S.A. ET AL*

In 2013, an SCC tribunal issued an award in a dispute between, on the one hand, the Republic of Kazakhstan and, on the other hand, the Moldovan company Ascom Group, investors Anatolie and Gabriel Stati, and a Gibraltar registered company. Shortly thereafter, Kazakhstan initiated proceedings before the Svea Court of Appeal to have the arbitral award declared invalid or set aside. Kazakhstan claimed, as concerning invalidity, that the award and the manner in which came about was incompatible with basic principles of the Swedish legal system (section 33(1) item 2 of the Act). In a judgment in 2016 the Court of Appeal rejected Kazakhstan's claims.

In 2019 Kazakhstan again filed suit with the Svea Court of Appeal, claiming that the 2013 arbitral award be declared invalid. Reference was again made to ordre public but now also to the provision according to which an award is invalid if it includes determination of an issue which, under Swedish law, may not be decided by arbitrators (section 33(1), item 1 of the Act).

By decision of 9 March 2020, the Court of Appeal dismissed Kazakhstan's case, finding that its earlier judgment had res judicata effect.[21]

The Court of Appeal stated that it is the relief sought which determines the res judicata effect of a previous judgment. This is a general rule in Swedish procedural law and, the Court of Appeal argued, there is no reason to take a different approach when it comes to a claim to invalidate an arbitral award. On the contrary, the fact that such claim can be brought without any time limit calls for a strict application of the res judicata principle.

The Court of Appeal noted that Kazakhstan in both actions before the court sought invalidity, that both actions concerned the same arbitral award and that the parties were identical. On the basis of this the Court of Appeal concluded that the 2019 action shall be dismissed for res judicata.

21. Decision by the Svea Court of Appeal on 9 Mar. 2020 in Case No. T 12462-19.