CHAPTER 7

# Arbitral Jurisdiction in Respect of Claims Based on Fraud and Other Non-contractual Grounds

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In commercial arbitration, it is relatively common that some claims or part of claims are based on tortious or criminal liability. This chapter examines the issue of whether an arbitral tribunal in commercial arbitration is authorized to try claims based on tort, fraud, bribery and other non-contractual grounds, assuming that the arbitration agreement is worded in accordance with the commonly used model arbitration clauses. The focus is on the position taken under Swedish and other Nordic laws.

The legal development both in Sweden and in other Nordic jurisdictions referred to in the chapter shows an increased focus on the interpretation of the arbitration clause and the reasonable expectations of the parties to the agreement, rather than on limiting the scope of the matters to be resolved by arbitration due to a narrow interpretation of the concept of 'legal relationship' found in the New York Convention and in national legislation. Thus, it appears from case law that claims based on non-contractual liability are generally accepted in arbitrations seated in the Nordics, provided that the arbitration clause, interpreted according to general contract interpretation principles, is deemed to cover the disputed facts in question.

## §7.01 INTRODUCTION

In commercial arbitration it is relatively common that some claims or part of claims are based on tortious or criminal liability. The claimant may argue that certain actions of the respondents constituted, e.g., fraud, not only breach of contract. The aim of such claims may be, e.g., to avoid the application of a limitation of liability clause. Criminal liability may also be invoked as an entirely independent ground, or as the sole basis for the claim in the arbitration.

The purpose of this chapter is to examine the issue of whether an arbitral tribunal in commercial arbitration is authorized to try claims based on tort, fraud, bribery and other non-contractual grounds, assuming that the arbitration agreement is worded in accordance with one of the model clauses connected to the most commonly used arbitration rules set out below. The focus of this article is on the position taken under Swedish and other Nordic laws.

According to the model clause of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), 'Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration.' The United Nations Commission on International Trade Law (UNCITRAL) model clause refers to 'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof', whereas the International Chamber of Commerce (ICC) model arbitration clause refers to 'disputes arising out of or in connection with the present contract'. Both the London Court of International Arbitration (LCIA) and the Singapore International Arbitration Centre (SIAC) model clauses refer to 'Any dispute arising out of or in connection with this contract'.

The wordings of these model clauses do not expressly exclude non-contractual disputes if they 'arise out of' or are 'connected with' or 'relate to' the contract in which the clause is included. Moreover, the clauses do not state that the dispute's connection with the main contract must be close or strong.

Historically, the predominant view was that claims relating, e.g., to corruption and bribery should not be tried by arbitrators. In an ICC arbitration award of 1963, the sole arbitrator Gunnar Lagergren, a Swedish judge, decided that a dispute relating to a contract concerning payments to Argentine officials was not arbitrable because it concerned payment of bribes.[1] Judge Lagergren refused to try the matter because, as he stated in the award, 'corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations'.[2] However, this view has developed and today such disputes are commonly deemed arbitrable, but the claims may of course be dismissed on the merits, e.g., under the principle of *pactum turpe*.[3] The question remains, however, whether such disputes are covered by the relevant arbitration agreement invoked as the basis for the jurisdiction of the arbitral tribunal.

## §7.02 THE NEW YORK CONVENTION

According to Article II(1) of the New York Convention, the contracting states must recognize arbitration agreements covering legal relationships 'whether contractual or not'. Thus, the wording of the convention supports the proposition that also non-contractual claims could be tried in arbitration.

1. ICC Case No. 1110.
2. *See* para. 20 of the award.
3. *See* Kaj Hobér, *International Commercial Arbitration in Sweden*, 2nd ed. p. 109.

However, Article II(1) of the New York Convention also states that the arbitration agreements to be recognized under the convention are agreements under which the parties undertake to submit to arbitration differences which have arisen, or which may arise between them in respect of a 'defined legal relationship', concerning a subject matter capable of settlement by arbitration. Is a possible future right to damages based on criminal liability a 'defined legal relationship' under this provision?

The term 'legal relationship' is not defined in the New York Convention. Nor is the word 'defined' in 'defined legal relationship' further clarified in the convention. However, according to case law that has developed in several contracting states, this wording should be given a broad and pro-arbitration meaning; see further below, e.g., concerning the Swedish case of *Belgor*.[4]

## §7.03 SWEDEN

### [A] Introduction

Under Swedish law, arbitration agreements covering existing disputes based on non-contractual grounds are valid and enforceable if the dispute is capable of settlement by agreement. Claim for damages based on fraud or other non-contractual grounds are capable of settlement, and, thus, if the arbitration agreement refers to such a dispute existing at the time of entering the arbitration agreement, the arbitrators would clearly have jurisdiction.

However, most arbitration agreements are made to cover potential future and yet unknown disputes, and the question is then whether this could include future disputes based on non-contractual grounds.

Under section 1 of the Swedish Arbitration Act, an arbitration agreement 'may relate to future disputes pertaining to a legal relationship specified' in the arbitration agreement.[5] As a starting point, this may include both contractual and non-contractual legal relationships. The Arbitration Act does not state how the legal relationship should be specified and whether a reference to one legal relationship may infer a reference to another legal relationship. The reason for the requirement to specify the legal relationship in the arbitration agreement is that the parties should be able to oversee the consequences of the arbitration agreement.[6] Thus, there is an element of foreseeability and party autonomy to consider when analysing the issue. The requirement is also based on the fundamental right to a fair trial and the right to go to court as protected under Article 6 of the European Convention on Human Rights.

According to the traditional view, a consequence of the requirement that the legal relationship must be specified in the arbitration agreement is that an arbitration agreement in respect of future disputes does not cover non-contractual claims. This may appear logical because the future then-unknown non-contractual dispute is

4. NJA 2017 p. 171 (Belgor).
5. *See also* Government Bill 1998/99:35 p. 212.
6. *See* NJA 2019 p. 171 (Belgor), para. 12 of the judgment.

strictly speaking another legal relationship than the one normally identified in the arbitration agreement (e.g., 'this contract' and 'the present contract' in the model arbitration clauses quoted above).[7]

However, Swedish case law developed since 2007 suggests that an arbitration clause concerning future disputes may also cover then-unknown non-contractual claims.

***NJA 2007 p. 475 (Vägmaterialet)***

In *NJA 2007 p. 475* (*Vägmaterialet*), the claimant had initiated court proceedings and claimed damages on three grounds, of which two were contractual or semi-contractual and one was based on an alleged crime, dishonest conduct,[8] by an employee of the defendant. Under Swedish tort law, a party who has suffered financial loss resulting from a crime is entitled to damages, and an employer is liable for such damages if an employee has committed the crime while on duty.[9] The parties had an agreement which included an arbitration clause merely stating that 'possible disputes should be resolved in accordance with the arbitration act'. Notably, the arbitration clause did not include a wording relating to disputes 'in connection with the contract' as found in model clauses. The district court and the Svea Court of Appeal dismissed the claim for lack of jurisdiction with reference to the wording of the arbitration agreement. The Supreme Court granted leave to appeal in respect of the issue of whether third ground, i.e., damages on the basis of the alleged crime, was covered by the arbitration agreement.

The Supreme Court found, first, that the arbitration clause should be interpreted to include all disputes in connection with the contract, although this was not expressly stated in the clause. Second, the court found that the factual circumstances invoked as a basis for the alleged crime had a direct connection with the contract. Third and finally, the court concluded that, because the two other grounds for the claim were covered by the arbitration clause, also the third ground should be deemed covered by the clause. Thus, the Supreme Court agreed with the lower courts essentially because of the alleged crime's connection with the legal relationship specified in the arbitration clause, and for reasons of procedural efficiency.

***NJA 2008 p. 120 (Ystad Hamn)***

In *NJA 2008 p. 120 (Ystad Hamn)*, the Supreme Court tried the question, whether certain claims based on infringement of competition law (abuse of dominant position) and violation of administrative legislation governing municipalities were covered by an arbitration agreement in a contract between *BornholmsTrafikken*, a ferry company owned by the Danish state, and *Ystad Hamn Logistik AB*, a company operating the

7. *See* Stefan Lindskog, *Skiljeförfarande*, Juno Version 3, section I:0:5.2.1.
8. Chapter 9, section 8 of the Swedish Criminal Code states that 'A person who … acts dishonestly by inducing someone by deception into an action or omission, thereby harming the person deceived or someone in whose place they are, is guilty of dishonest conduct.'
9. Chapter 2, section 2 and Chapter 3, section 1 of the Swedish Tort Liability Act.

Ystad port and owned by the Swedish municipality of Ystad, a place well known for readers of Henning Mankell's crime novels about Inspector Kurt Wallander.

Under the contract, *Ystad Hamn Logistik AB* had charged fees for its port services, and *BornholmsTrafikken* claimed that certain of these fees were excessive and constituted a violation both of competition law and of administrative law. The contract included an arbitration clause merely stating that possible disputes should be resolved by arbitration according to Swedish law. Thus, in this contract, there was no 'in connection with' wording in the arbitration clause.[10] *Ystad Hamn Logistik AB* requested that the court should dismiss the claim for repayment of fees due to the arbitration clause.

The Supreme Court agreed with this argument and dismissed the repayment claim for lack of jurisdiction. First, it stated that, according to an express provision in section 1 of the Arbitration Act, arbitrators may rule on the civil law effects of competition law as between the parties. In this part, the Supreme Court also referred to the judgment of the European Court of Justice in *Eco-Swiss v. Benneton*.[11] Second, the court stated that the claim had a strong connection to the contract and, therefore, that it was covered by the arbitration clause. Although *BornholmsTrafikken* did not base its claim directly on the contract, the claim concerned the fees charged under the contract.

***NJA 2010 p. 734 (Tupperware)***

In *NJA 2010 p. 734 (Tupperware)*, the bankruptcy estate of *Facht Distribution AB* initiated court proceedings against *Tupperware Nordic A/S*, a Danish company, and claimed that certain goods should be returned to the estate or, alternatively, that an amount equivalent to the value of the goods should be paid. The parties had a franchise agreement which had been terminated by *Tupperware Nordic A/S*. The franchise agreement included a dispute resolution clause stating that disputes should be resolved by the court at the seat of *Facht Distribution AB.* Therefore, the estate filed its claim with a district court south of Stockholm. *Tupperware Nordic A/S* objected to Swedish jurisdiction and stated that it is a company seated in Denmark.

Although the case was not about an arbitration clause, the Supreme Court refers to arbitration law and compares the requirement for a defined legal relationship in section 1 of the Arbitration Act to the requirements for a defined legal relationship in prorogation clauses. The Supreme Court stated, obiter dictum as regards arbitration clauses, that the existence between a legal relationship, covered by a prorogation clause or an arbitration clause, and another legal relationship only in certain cases and in very special circumstances may extend the clause to cover such other legal relationship. The court also stated that the above-referenced judgment in *Vägmaterialet* of 2007 constituted such an exception to the main rule. Notably, none of the justices

10. *See* further Daniel Waerme, *Behörighetsproblematiken i tvister som endast delvis omfattas av skiljeavtal*, SvJT 2010 pp. 714-725; Finn Madsen, *Kompetenz-Kompetenz in Swedish Arbitration Law is being recast, how should it be done?,* SvJT 2016 pp. 653-673.
11. ECJ Case No. C-126/1997.

involved in the ruling of 2007 were involved in this ruling of 2010.[12] Eventually, the Supreme Court stated that, although it did not have jurisdiction because of the prorogation clause, it confirmed Swedish jurisdiction because *Tupperware Nordic A/S* had assets in Sweden in the form of a claim against the estate to be handled in the bankruptcy proceedings.

***NJA 2017 p. 226 (Avräkningsavtalet)***

In *NJA 2017 p. 226 (Avräkningsavtalet)*,[13] the Supreme Court continued in the line of reasoning found in *NJA 2010 p. 734 (Tupperware)*. The parties to the latter dispute were former shareholders in a limited liability company, *Arvika Gjuteri Holding AB*, which had been sold to a third party. When the company was sold, one of the shareholders, *Kemisten AB*, undertook the task of administering the sale on behalf of all shareholders, including receiving the purchase price and distributing the money to the sellers. For this purpose, the sellers concluded a contract with an arbitration clause. According to the wording of the clause, disputes relating to the interpretation or implementation of the contract was to be settled by arbitration under the SCC Rules. Thus, there was no wording to the effect that disputes 'in connection with' the contract.

After the transaction was completed, *Kemisten AB* paid a part of the purchase price to a third party, in breach of the parties' contract. Therefore, three of the sellers filed claims with a district court against *Kemisten AB* and its managing director and claimed damages on the grounds that the managing director had committed criminal offences by paying funds to a third party, and that *Kemisten AB* had vicarious liability for the actions of the managing director.

The defendants requested dismissal of the case with reference to the arbitration agreement. The district court allowed for court proceedings, but the Court of Appeal dismissed the claim due to the arbitration clause.

The Supreme Court agreed with the district court and concluded that the claims were not covered by the arbitration clause. The court referred to *Tupperware* and stated that it is only in certain cases and in very special circumstances that the arbitration clause may extend to cover another legal relationship than the one referred to in the arbitration clause. Thus, according to the reasoning in *Avräkningsavtalet*, an arbitration clause in a contract basically only covers the legal relationship or relationships regulated in the contract and no other legal relationships.

As regards non-contractual grounds, the Supreme Court stated that, if a breach of contract also constitutes tortious or criminal liability, then the tortious or criminal liability may in some cases be covered by an arbitration clause. However, the Supreme Court stated that this requires that the facts invoked as a legal basis for the non-contractual liability in all material aspects correspond to facts that could have constituted contractual liability.

12. *See* further Finn Madsen, *Kompetenz-Kompetenz in Swedish Arbitration Law is being recast, how should it be done?*, SvJT 2016 p. 662.
13. *See* further Fredrik Norburg and Erika Finn, *Supreme Court clarifies doctrine of connection*, International Law Office, 11 May 2017.

In the case at hand, the Supreme Court determined that the claims were based on also other facts than a possible claim for payment under the contract, including issues concerning the alleged criminal actions of the managing director and *Kemisten AB's* responsibility for such actions.

***NJA 2019 p. 171 (Belgor)***

After *Tupperware* of 2010 and *Avräkningsavtalet* of 2017, one could have concluded that the ruling of *Vägmaterialet* of 2007 had a very limited application. However, this may have changed through the landmark ruling of *NJA 2019 p. 171 (Belgor)*.[14]

The SCC arbitration between the Turkish company *Koca Inşaat Sanayi Ihracat Anonim Şirketi* and the Belarusian *Joint Stock Company Belgorkhimprom* (Belgor), concerning a construction project in Turkmenistan, was initiated on the basis of an SCC clause covering disputes 'emerged because of or in connection with' the construction contract.

There were several claims made in the arbitration, including claims relating to additional works governed by five separate service agreements. The service agreement did not include an SCC arbitration clause, but a clause stating that, if the parties failed to resolve the dispute through negotiations, 'each of the Parties has the right to petition Minsk economic court and the laws and regulations of the Republic of Belarus shall apply to such disputes'.

The arbitral tribunal found that the claims for additional works did not arise out of the construction contract containing the SCC arbitration clause and that it was 'undisputed that the Additional Works were performed on the basis of five separate contracts, which did not have arbitration clauses, but which stipulated that the Parties had the right to refer disputes to the Economic Court in Minsk'.[15]

However, the arbitral tribunal also found that the additional works in relation to these claims were performed in connection with the construction contract and, therefore, as such covered by the wording of the arbitration clause in the construction contract. Moreover, the arbitral tribunal decided that the dispute resolution clause in the service agreements only gave the parties a right but not an obligation to refer their disputes to the court in Minsk.

In a judgment dated 31 October 2017, the Svea Court of Appeal set aside the award partially, including on the ground that the arbitral tribunal lacked jurisdiction to rule on the claims relating to the additional service agreements.[16] In its judgment, the Svea Court of Appeal quoted the reasoning of the Supreme Court in *Avräkningsavtalet*. At the same time, however, the Svea Court of Appeal expressed a subtle uncertainty as to the issue of when legal relationships connected with the main contract should be deemed covered by an arbitration clause when it stated that 'at least nowadays' it is only in exceptional cases possible to extend the scope of an arbitration clause based on a connection with the legal relationship covered by the arbitration clause. This

14. The author acted as counsel in the challenge proceedings.
15. Paragraph 84 of the arbitration award.
16. An English translation of the Svea Court of Appeal judgment is available online at the Swedish Arbitration Portal.

statement of uncertainty was possibly a reference to the Supreme Court judgment in *Vägmaterialet*.

The Supreme Court reversed the Svea Court of Appeal judgment and clarified, or perhaps changed, Swedish arbitration law in certain aspects, including in relation to jurisdiction.[17]

First, the Supreme Court stated that the scope of an arbitration agreement is determined under customary principles for contract interpretation. It referred to the ruling in *NJA 2015 p. 741 (Partneravtalet)* concerning general contract interpretation and concluded that it is natural to assume that the arbitration agreement should fulfil a sensible function and serve as a reasonable set of rules for the parties' respective interests. Therefore, it may be assumed that the parties intended that disputes should be resolved swiftly and in one comprehensive proceeding before an arbitral tribunal appointed by the parties.

Moreover, the court stated that, when interpreting arbitration agreements and the term 'legal relationship', the principles of the New York Convention should be considered. It noted that the principles of the convention have in foreign case law and international jurisprudence been taken to justify an expansive interpretation of both the arbitration agreement and the concept of a 'legal relationship'.[18]

As regards its previous ruling in *Avräkningsavtalet*, it repeated a statement in this judgment that the term 'legal relationship' does cover not only those rights and obligations that have been set forth in an original agreement but also subsequent legally relevant circumstances, which alter the content of the agreement, fall within the scope of the term and thereby within the applicable scope of an arbitration clause in the original agreement. As regards *Vägmaterialet*, the Supreme Court stated that 'a ground outside the contractual relationship could be deemed to fall inside the applicable scope of the arbitration clause' and noted that in *Vägmaterialet* the non-contractual ground for the claim was deemed so closely related to the other grounds that also the non-contractual ground was deemed covered by the arbitration clause. Notably, in *Belgor*, the Supreme Court did not repeat the statements made in *Avräkningsavtalet* that the arbitration clause may extend to cover another legal relationship than the one referred to in the arbitration clause only in certain cases and in very special circumstances.

To bridge a possible conflict between the rulings in *Avräkningsavtalet*, on the one hand, and *Vägmaterialet* and *Belgor*, on the other hand, the difference in the wordings of the arbitration clauses should be noted. In *Avräkningsavtalet*, the clause only

17. The Supreme Court's judgment, NJA 2019 p. 171 (Belgor), has been discussed in several articles, including Patrik Schöldström, *Har Belgor förändrat prövningen av en skiljenämnds behörighet och handläggningsfel?*, Juridisk Tidsskrift Nr 1 2019/20, p. 243; Christer Danielsson, *Swedish Arbitration-Related Case Law 2017–2019*, Stockholm Arbitration Yearbook 2019; Lars Heuman, *Har det skett en omsvängning eller omläggning av praxis från restriktiv till extensiv tillämpning av skiljeavtal?*, SvJT 2019 p. 534. An English translation of the Supreme Court judgment is available online at the Swedish Arbitration Portal.
18. Here the Supreme Court also referred to Gary B. Born, *International Commercial Arbitration*, 2nd ed. 2014, pp. 1317 ff., and Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, 1994, p. 259.

referred to interpretation or implementation of the contract, not disputes 'in connection with' the contract. In *Belgor*, the arbitration clause expressly included disputes in connection with the contract, whereas in *Vägmaterialet* this was how the Supreme Court interpreted the clause, although there was no express wording to this effect.

Since the Supreme Court accepted the reasoning of the arbitral tribunal in *Belgor,* a model arbitration clause, including the wording 'arising out of or in connection with the contract', should arguably be interpreted to include disputes concerning legal relationships connected with the contract, or at least closely connected with the contract. Although *Belgor* concerned contractual relationships, the judgment does not exclude that the same reasoning is applied in respect of claims based on tortious or criminal liability. Examples of such claims in connection with a contract could be non-contractual claims based on circumstances that presuppose the existence of the contract, or non-contractual claims that, alternatively, could have been formulated as a contractual claim. Claims based on non-contractual legal relationships only loosely connected with the contract would then, arguably, fall outside of the scope of the arbitration clause. Potentially, a very expansive interpretation and application of an arbitration clause could violate the parties' reasonable expectations in respect of the foreseeable effects of the arbitration clause.

A similar view was expressed by the arbitral tribunal in an unpublished SCC arbitration award rendered in 2021.[19] The arbitration, seated in Stockholm, was initiated on the basis of an SCC model arbitration clause, and included negative declaratory claims covering claims based on allegations of fraud and bribery. However, all circumstances invoked as a basis for the claims presupposed the existence of the contract, i.e., without the contract the alleged criminal liability as a basis for damages would not have been possible. Moreover, it would likely have been possible to formulate the claims as arising directly under the contract instead of as non-contractual claims. Therefore, with reference to the Supreme Court's rulings in both *Avräkningsavtalet* and *Belgor,* the arbitral tribunal accepted jurisdiction and tried the claims based on criminal liability.

## §7.04 NORWAY

Sweden is not regarded as a UNCITRAL Model Law jurisdiction. Therefore, it may be of interest to see if the issues discussed in this article have been dealt with differently in its neighbouring Model Law jurisdictions Norway and Denmark.

As regards Norway, its Supreme Court came to similar conclusions as *Vägmaterialet* and *Belgor* in the case of *I.M. Skaugen Marine Service v. MAN Diesel* of 2017.[20]

This case included claims that respondents requested the court to dismiss with reference to an arbitration clause stating that '[a]ny dispute arising out of or relating to

19. The author acted as counsel in the SCC arbitration.
20. HR-2017-1932, *IM Skaugen Marine Service Pte Ltd v. MAN Diesel & Turbo SE, Man Diesel & Turbo Norge AS*. *See also* comments concerning another part of the judgment by Carl E Roberts and Norman Hansen Meyer, *International Arbitration Review*, 11th ed. 2020, pp. 327-329.

this Contract shall be finally settled by arbitration in accordance with the Rules of Procedure of the Copenhagen Court of Arbitration'.

The Supreme Court first stated that it should not only consider how the claimant has formulated its case, and quoted a statement by Gary B. Born that ' … it is frequently said that a party may not defeat an arbitration clause by casting its claim in tort, rather than contract'.[21] Therefore, the Supreme Court concluded that whether or not the claim is subject to arbitration 'must consequently be decided based on an interpretation of the arbitration agreement'.[22]

The Supreme Court continued and noted that the wording of the arbitration clause is general, and that it does not give room for reading limitations into it. Moreover, the Supreme Court referred to a previous case between *SAS* and *Icelandair* where it was held that it must be assessed whether there is a connection between the claim and the contract, irrespective of whether the claim is non-contractual or contractual.[23] The Norwegian Supreme Court referred to international case law and literature[24] and stated that '[i]rrespective of the fact that the alleged legal basis for Skaugen's claim for damages is non-contractual liability, this claim and the claims arising from the contract are closely connected'.

The Supreme Court also noted that several claims for damages relating to the alleged fraud had been submitted for arbitration by Skaugen as reflected in an arbitral award previously rendered in Stockholm. Thus, also Skaugen appeared to have shared the view that these types of claims were covered by the arbitration clause.

Finally, the Supreme Court stated that policy considerations suggest that various disputes arisen in connection with the contract should be heard as one. The court assumed that this had been the purpose of the general wording of the arbitration clause.[25]

## §7.05 DENMARK

In Danish law, it is also held that a broadly worded arbitration clause may comprise claims for damages based on non-contractual grounds, including claims based on criminal liability.[26]

In case *U2013.2338H*, the Danish Supreme Court found that an arbitration clause covered non-contractual claims concerning, *inter alia*, a violation of the financial business act.

Some of the defendants in the case, including former management of *Ebh Bank*, had reached severance agreements following the termination of their contracts with the

21. Gary B. Born, *International Commercial Arbitration*, 2nd ed. p. 1359.
22. In this connection the court also referred to Norwegian Official Report 2001:33 p. 39.
23. Case Rt-1993-777.
24. Gary B. Born, *International Commercial Arbitration*, 2nd ed. p. 1359, and the House of Lords' decision of 17 October 2007 in *Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others.*
25. Here the court also referred to the Supreme Court decision in case Rt-1994-1489.
26. Jakob Juul and Peter Fauerholdt Thommesen, *Voldgiftsret*, 3rd ed. p. 120; Niels Schiersing, *Voldgiftsloven med kommentarer*, 2016, pp. 110-113.

bank. The severance agreements included an arbitration agreement that referred the parties to resolve disputes concerning the interpretation of the severance agreements by arbitration under the Rules of the Danish Arbitration Institute.

Following the collapse of *Ebh Bank* in 2008, claims for damages were initiated in court against the former directors, management and auditors of the bank, including some of the parties to the severance agreements. According to the Western High Court, the action was outside of the prerequisites of the severance agreements. After appeal, however, the Supreme Court found that the wording of the arbitration agreement covered the dispute in question and dismissed the case.[27]

## §7.06 FINLAND

Finland is not a Model Law jurisdiction, but it is currently exploring whether it should adopt the Model Law. Whether or not a future reform will affect the issues discussed in this article remains to be seen. As regards the present law on the topic of non-contractual claims in arbitration, the Finnish Supreme Court rendered a judgment in 2008 in which it confirmed that also non-contractual claims connected to a contract with an arbitration clause may be tried in arbitration.[28]

In this case, two parties to a shareholders' agreement brought a claim for damages against the third party to the agreement. However, the claim was filed in criminal proceedings where the third party was prosecuted for fraud. The shareholders' agreement included an arbitration clause stating that disputes arising out of the agreement shall be settled by arbitration. The question then arose whether the claim for damages brought in the criminal proceedings should be dismissed because of the arbitration clause.

Essentially, the facts invoked as a basis for the claim for damages were related to certain terms in the shareholders' agreement and a supplement to this agreement concerning the duty of a party to inform the other parties on the intention to sell the shares in a company, and on how the purchase price should be divided. According to the claimants, the breach of these terms constituted a criminal offence.

The Supreme Court found that the parties had agreed to having all claims arising out of the shareholders' agreement settled by arbitration. The court also found that, even when a breach of contract is also a criminal offence, a claim for damages based on such facts can be settled by arbitration. A claim which is covered by the arbitration agreement cannot be tried by a general court just because the claim is based on a criminal offence.[29] According to the court, the claims were, therefore, covered by the arbitration clause and should be dismissed for lack of jurisdiction, even if the claimants invoked the alleged criminal offence as a ground for the claim.

27. *See also* the Supreme Court cases 217/2013 and U2014.2042H where the claims were dismissed with reference to the arbitration clause in the General Conditions for Consulting Services (ABR 89), even if non-contractual grounds were included.
28. Case KKO:2008:102, commented by Marko Hentunen, *Supreme Court: Arbitration Clause is Obstacle to Claiming Damages in Criminal Trial*, International Law Office, 12 February 2009.
29. Case KKO 2008:102, p. 6.

## §7.07 CONCLUDING REMARKS

The legal development both in Sweden and in other Nordic jurisdictions referred to in this article shows an increased focus on the interpretation of the arbitration clause in accordance with general contract interpretation principles and on the reasonable expectations of the parties to the agreement, rather than on limiting the scope of the matters to be resolved by arbitration due to a narrow interpretation of the concept of 'legal relationship'.

This also corresponds to a legal trend where arbitration agreements are treated and interpreted as any other commercial contract, rather than being restrictively interpreted and applied because arbitration agreements exclude the important right to go to court. In many jurisdictions, the current position is rather that arbitration agreements should be interpreted expansively.[30]

As regards wordings such as 'relating to' and 'in connection with', there is support for a broad application in the case law of many jurisdictions, including England, USA, France, Switzerland, and other major arbitration jurisdictions.[31] This international practice is now established also in Sweden through the ruling of *Belgor*.

In a number of jurisdictions, there have been attempts to define what is required to determine the sufficient 'connection' between the non-contractual claim and the contract containing the arbitration clause, including 'go to the core of the parties' contractual relationship', are 'intertwined factually and legally' and 'greatly overlap'. Gary B. Born has stated that these attempts 'usefully capture the core concept that the focus of analysis should be on the underlying factual setting and actions, as well as on the parties' presumed desire for efficient, centralized and fair proceedings'.[32]

In any event, it appears from the case law discussed in this article that damage claims based on non-contractual liability are generally accepted in arbitrations seated in the Nordics, provided that the arbitration clause, interpreted according to general contract interpretation principles, is deemed to cover the disputed facts in question. This arbitration-friendly interpretation is also consistent with the case law developed in many other important arbitration jurisdictions.[33]

If a broad or liberal approach to the scope of the arbitration agreement is taken very far, this may of course surprise the parties to the arbitration agreement and violate their reasonable expectations as regards what dispute resolution method they have chosen and what they have decided not to choose. This may, e.g., be the case when the facts indicate that the parties indeed intended to resolve their various disputes in separate fora, even if such disputes are related.[34]

However, it is likely that reasonable businesspersons expect that the model arbitration clauses referring to disputes 'arising out of or in connection with the

30. Gary B. Born, *International Commercial Arbitration*, 3rd ed. p. 1432.
31. Gary B. Born, *International Commercial Arbitration*, 3rd ed. pp. 1455-1459.
32. Gary B. Born, *International Commercial Arbitration*, 3rd ed. p. 1471.
33. Gary B. Born, *International Commercial Arbitration*, 3rd ed. pp. 1465-1471.
34. *Cf*. the reasoning in *Belgor* in relation to the dispute resolution clause referring to a court in Minsk.

contract' should be interpreted and applied to give full effect rather than adding implied limitations to the scope through the concept of the legal relationship. This expectation includes that non-contractual claims based on fraud and other criminal or tortious liabilities should be deemed covered by the arbitration clause if they have arisen in connection with the contract. Arguably, this should at least be the case for non-contractual claims that presuppose the existence of the contract, and non-contractual claims that could have been brought as a claim under the contract.