CHAPTER 15

Arbitration and Public Procurement: A Match?

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§15.01 INTRODUCTION

In 2020, the annual turnover of the sectors subject to public procurement in Sweden alone exceeded SEK 800 billion.[1] There is, therefore, no question that public procurement plays a major role in the Swedish economy. The aim of the public procurement rules is to govern the procurement process from 'A–Z', i.e., from the first decision of the contracting authority to commence a procurement, all the way through to the establishment of a contractual relationship between the contracting authority/entity and the winning bidder but, ever since the rules were first introduced in the early 1990s, they have repeatedly been accused of being complex and inflexible.

In 2020 alone, there were over 3,500 public procurement judicial review cases submitted to Swedish administrative courts.[2] In addition, Swedish civil courts frequently try public procurement-related damages claims and contract disputes. It is no exaggeration to state that private enforcement in the public procurement field is a reality in Sweden. Some commentators suggest that the significant number of public procurement judicial review cases every year – as well as other types of public procurement disputes – is explained by the alleged complexity and inflexibility of the rules. Others regard it as a sign of the high value and importance of public contracts among suppliers. A third explanation might be judicial availability. General *access to justice* – at least as to review cases – must be deemed to be high in Sweden and the awareness among suppliers of these circumstances is, one must assume, fairly high.

1. *See* statistics published on The Swedish Agency for Public Procurement's website: https://www.upphandlingsmyndigheten.se/statistik-som-utvecklar-den-offentliga-affaren/fortsatt-okat-intresse-for-offentliga-upphandlingar/.
2. *Ibid*.

Irrespective of the reason, public procurement undoubtedly also plays a major role in Swedish judicial life. Similarly, irrespective of the aim of the public procurement rules as such, the great number of disputes has to some extent, in practice, transformed the public procurement field into a litigation field. Indeed, there are obvious interactions between public procurement and litigation. But what about public procurement and *arbitration*?

As a dispute resolution lawyer with one foot in the public procurement field and the other in litigation/arbitration, I have a long-standing interest in the possible interactions between these different fields of law. What role, if any, may arbitration as a dispute resolution mechanism play in the public procurement field? The scope of this chapter is to explore this subject. The general questions probed are the following:

(a) How may arbitration play a role in public procurement-related disputes *de lege lata* (and, possibly, *de lege ferenda*)?
(b) What are the possible implications in and/or overall challenges to using arbitration as a dispute resolution mechanism in the public procurement field?

In order to approach the subject and the questions above, an introduction to the public procurement rules – including the judicial remedies available under these rules – for the, one assumes, more arbitration law-focused reader is required (*see* section §15.02).

Thereafter, an attempt will be made to identify some of the possible answers to questions (a) and (b) above (*see* section §15.03).

Finally, I will conclude with some closing remarks (*see* section §15.04).

My research and findings are limited to a Swedish law perspective.

§15.02 PUBLIC PROCUREMENT RULES: AN OVERVIEW

[A] Background, Purpose and Overall Content

Different types of public bodies (governmental authorities, municipalities, state- and municipality-owned companies etc.) have different kinds of functions and, depending on the situation, play different roles. In order to be able to perform the duties assigned to them, they are entrusted with certain powers in relation to the public, such as, the power to decide on taxes, different kinds of permissions, benefits. Some public bodies might even be entrusted with the power to use force, if necessary.

When a public body wishes to acquire something, it takes on another role. It acts as a *contracting authority* and enters into a contractual relationship with a supplier governed by private law. Therefore, once such a contractual relationship is established, the public body – i.e., the contracting authority – is to be regarded in the same way as any other party to a commercial contract, with the rights and obligations deriving from

such a contract. However, *the route* to the establishment of such a commercial contract is regulated and subject to certain legislation: the public procurement rules.[3]

The Swedish public procurement rules emanate from European Union (EU) law. The central EU directives in the field[4] are implemented into Swedish law through four different acts:

(1) Swedish Public Procurement Act (2016:1145) (the SPPA).[5]
(2) Swedish Utilities Procurement Act (2016:1146).[6]
(3) Swedish Concession Procurement Act (2016:1147).[7]
(4) Swedish Defence and Security Procurement Act (2011:1029).[8]

Which act is applicable depends on the nature of the contract awarded and the sector in which the contracting authority is active. The overall purpose of the acts remains the same:[9] to regulate (with some exceptions)[10] the public tender and submit it to a step-by-step procedure, from the decision to pursue the acquisition, through to the final result of such an acquisition, namely the entry into a contract with the selected supplier. From an EU perspective, the aim of the rules is to facilitate cross-border trade between the EU Member States, i.e., the establishment and maintenance of the EU inner market.[11] Thus, the acquisition of the public tender should be open to competition. The rules emanate from five fundamental principles:[12]

(1) *Principle of non-discrimination*: the prohibition to discriminate suppliers based on nationality. For example, a Swedish contracting authority is prohibited from including requirements that only Swedish suppliers will satisfy.
(2) *Principle of equal treatment*: all suppliers must be given the same opportunities and in all other ways be treated in the same manner.
(3) *Principle of proportionality:* the defined requirements in a procurement must be proportional and must not go beyond what is necessary for the procurement in question.

3. Henceforth, the term 'public contract' will be used for a contract between a contracting authority and a supplier (post a competitive procurement or via a direct award). Further, the public procurement rules also cover framework agreement. However, henceforth references will only be made to contract.
4. (i) Directive 2009/81/EC ('Defence and Security Procurement Directive'); (ii) Directive 2014/23/EU ('Concession Procurement Directive'); (iii) Directive 2014/24/EU ('Public Procurement Directive'); (iv) Directive 2014/25/EU ('Utilities Procurement Directive'); and (v) Directives 89/665/EEC, 92/13/EC and 2007/66/EC ('Remedies Directives').
5. Sw: Lagen (2016:1145) om offentlig upphandling.
6. Sw: Lagen (2016:1146) om upphandling inom försörjningssektorerna.
7. Sw: Lagen (2016:1147) om upphandling av koncessioner.
8. Sw: Lagen (2011:1029) om upphandling på försvars- och säkerhetsområdet.
9. Henceforth on a Swedish domestic level, references will be made to the SPPA alone. However, corresponding provisions are to be found in the other acts as well.
10. *See* Chapter 3 of the SPPA.
11. *See,* e.g., Arrowsmith: *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (3rd edition, Oxford 2014) pp. 150–155.
12. Chapter 4, s. 1 of the SPPA.

(4) *Principle of transparency*: all procurements must be conducted in a transparent and non-secret manner. All the requirements must be clearly established in the tender documentation, and, arguably, the most important rule emanating from this principle is the obligation to publish a procurement and inform the participating suppliers in writing about the result.
(5) *Principle of mutual treatment:* Certificates etc. issued by authorities in one EU Member State must be recognized and applicable in other EU and EEA[13]states.

Several types of procurement procedures exist, e.g., the *open procedure* and *negotiated procedure*. The freedom of the contracting authorities to choose the procurement procedure differs between the various procurement acts. In a procurement where the SPPA is applicable (which is the case in the majority of procurements), the use of a negotiated procedure is limited to more complex procurements.

The nature of a procurement, and the different steps involved, differ, depending on the procedure. Heavily simplified, and in a nutshell, a procurement comprises, *inter alia,* the following elements:

- *Publication of the procurement*: the announcement to the market and its suppliers of the commencement of the procurement.
- *Publication of the procurement documents:* depending on the type of process, the procurement documents are published either in connection with the publication of the procurement or on a step-by-step basis during the process. The procurement document must include all information necessary to the procurement and its conditions, such as mandatory requirements (in relation to the suppliers as well as the subject of the acquisition), evaluation principles and award criteria, contract drafts etc.
- *Qualification of suppliers*: pursuant to the qualification criteria set out in the procurement.
- *Tender stage*: the suppliers formulate and submit their tenders. In an *open procedure,* none of the content of the procurement documents, including the terms and conditions of the contract draft, is open for negotiation. Any supplier who wishes to participate is left to submit its tender in accordance with the procurement documentation. In a *negotiated procedure,* this stage includes negotiations with the qualified suppliers, meaning that not everything contained in the procurement documents is 'set in stone', some of it is open for negotiation. However, specified minimum requirements and award criteria cannot be subject to negotiation. Further, any negotiations must be conducted in accordance with the fundamental principles, implying, *inter alia,* that all participating suppliers must be given the same opportunities, information etc.
- *Evaluation and award stage*: the contracting authority evaluates the tenders pursuant to the award criteria specified in the procurement document and

13. European Economic Area.

awards the contract to the winning supplier. Only suppliers who fulfil all mandatory requirements may be selected and awarded the contract.

- *Standstill period:* following the announcement of the award, the contracting authority is prevented from entering into the contract during a standstill period (normally ten days). During the standstill period, the procurement is open for challenge in court (*see* further section §15.02[B][2]). If the procurement is challenged, the standstill period is automatically prolonged during the court procedure in the first instance.[14]
- *Establishment of contract:* after the end of the standstill period, or after the dismissal of any judicial review application and such ruling having become legally binding, the contracting authority and the winning supplier may enter into the contract. The procurement comes to an end and is replaced by a contractual relationship between the contracting authority and the winning supplier.

Needless to say, bearing in mind the aim of the public procurement rules and the obligation to open up the public acquisition to competition, the failure to publish a procurement when required constitutes one of the most serious breaches of the public procurement rules. For a public body to ignore the potential competition and, without publication, reach out to one supplier alone, clearly violates the principles of equal treatment and transparency, and is commonly referred to as an *illegal direct award of contracts*.[15]

Further, since the nature of the public procurement rules is to regulate the procurement, they no longer apply once the contract in question has been entered into between the contracting authority and the winning supplier, and the procurement is finalized. From that point onwards, the relationship between the contracting authority and the supplier is governed by contract law. However, there are exceptions to this rule. Generally, no *substantial modifications*[16] may be made to public contracts. If a public contract is substantially modified, the modified contract is, from a public procurement law perspective, to be regarded as a *new* contract which, in turn, must not be entered into without publication and a call for competition. Entering into a contract without a call for competition – i.e., an unlawful direct award – is regarded as one of the most serious breaches of the public procurement rules.

Example 1: Let us assume that a contracting authority conducts a procurement for a certain goods, '*X*'. The contracting authority enters into a contract with the winning supplier and a contractual relationship, governed by contract law, is established between them. The contracting authority is satisfied with the performance of the supplier and wishes to extend the cooperation by expanding the contract to include the purchase of another goods, '*Y*'. From a contract/private

14. An interim relief, preventing the contracting authority from entering into contract, is required in the higher instances.
15. Sw: otillåten direktupphandling.
16. Chapter 17, ss 9–13, of the SPPA contain a catalogue of lawful modifications (modifications of lesser value, modifications in accordance with a review of option clause etc.).

law perspective, such modification of the contract hardly raises any concerns. But from a public procurement law perspective, by introducing Y into the contract, the contracting authority has, arguably, entered into a new contract without a call for competition, i.e., it has committed an unlawful direct award.

It is submitted that the prohibition to modify public contracts or framework agreements substantially makes perfect sense. Indeed, if a contract is substantially modified during the contract period, it is no longer equal to the one published for competition in the first place. The key question is the following: would the contract have attracted other suppliers if it had included the modification from the beginning? Going back to Example 1: would other suppliers have been interested in participating and submitting tenders had the contract included not only goods X but also goods Y, at the time of the procurement?

[B] Judicial Remedies

[1] General

Judicial remedies form an important part of the public procurement law system. These rules emanate from the Remedies Directives, and are included in all the Swedish public procurement acts. The rules enable suppliers to act against alleged breaches of the public procurement rules in three different ways:[17]

(1) Remedy 1: Apply for judicial review of a procurement.
(2) Remedy 2: Apply for judicial review of the validity of a contract.
(3) Remedy 3: Claim damages.

Remedies 1–3 consist of the application of EU directive-based legislation in the domestic court system. The ultimate interpreter of EU legislation is the Court of Justice of the European Union (the CJEU). A key aspect of the CJEU's interpretative functions is the preliminary ruling procedure pursuant to Article 267 of the Treaty on the Functioning of the European Treaty (the EU Treaty). The availability of preliminary rulings is a cornerstone for ensuring an effective and uniform interpretation of EU law, including its public procurement rules. This issue will be returned to at a later stage in this chapter.

[2] Remedy 1: Judicial Review of a Procurement

Remedy 1, judicial review of a procurement, is by far the most common. Around 7.6% (1,356 of 17,938) of all procurements published in 2020 were reviewed.[18]

17. The public procurement acts also provide for a fourth type of court procedure, actions for procurement fines. Such actions are brought by Swedish Competition Authority (the SCA) against a contracting authority for certain types of public procurement law violations. A procurement fine action does not preclude a suppler from bringing judicial review cases or to claim damages.
18. *See* note 1 above.

As a general rule, when a contracting authority has awarded a contract, it must send an award notice to all participating suppliers.[19] As stated, the contracting authority is prohibited from entering into the contract during a standstill period and during that period, an application for a review of the procurement in question may be submitted.[20] The competent court is the Administrative Court[21] of the court district in which the contracting authority is established.[22] Hence, the jurisdiction lies with the administrative courts[23] and the Administrative Procedure Act (1971:291)[24] applies to the procedure.

For a supplier to be successful, it must demonstrate two things: (i) a public procurement law violation; and (ii) that such violation has caused or may cause the supplier harm. Hence, there must be a causal link between the alleged public procurement violation and the alleged harm to the supplier. If the application is successful, the court will decide that the procurement shall be (i) recommenced; or (ii) corrected.[25]

[3] Remedy 2: Judicial Review of the Validity of a Contract

Once a contracting authority has entered into a contract, the *procurement* which proceeded such contract may not be subject to a judicial review. In such a scenario, the door to Remedy 1 closes, but another door opens (primarily in case of an illegal direct award): Remedy 2 – judicial review of *the validity of the contract* (commonly referred to as 'invalidity cases').[26] If a supplier is successful in such a review case, the court will declare the contract null and void.[27] The invalidity works retroactively – i.e., *ex tunc*[28] – with the effect that all performances under the contract (payments, deliveries etc.), shall, as a main rule, be reversed.

Like procurement cases, invalidity cases fall within the jurisdiction of the administrative courts.[29] Hence, in these cases, an *administrative* court has the power to declare *a binding contract under private law* null and void. The invalidity as such must be interpreted in a private law sense, and a contract which has been declared invalid may not be enforced in court. However, it is crucial to bear in mind that a public contract is not null and void per se due to a public procurement violation: the invalidity is a result of the administrative court's decision. Therefore, without a (successful) invalidity action, the contract is not invalid.

19. Chapter 12, s. 12 of the SPPA.
20. Chapter 20, s. 1 of the SPPA.
21. Sw: Förvaltningsrätt.
22. Chapter 20, s. 5 of the SPPA.
23. Sw: allmänna förvaltningsdomstolar.
24. Sw: Förvaltningsprocesslagen (1971:291).
25. Chapter 20, s. 6 of the SPPA.
26. Sw: Ogiltighetstalan.
27. Chapter 20, s. 13 of the SPPA.
28. *See*, e.g., the *travail prépatoire*, proposition 2009/10:180, p. 136.
29. Chapter 20, s. 5 of the SPPA.

The possibility for a supplier to bring an invalidity action should be regarded as a tool to combat illegal direct awards.[30] It is notable that, in illegal direct award cases,[31] harm is not a prerequisite to assent. A supplier must claim to have suffered (or have run the risk of suffering) harm to have standing, but, unlike in the review of procurement cases, there is no need to show harm or risk of harm. Hence, the mere fact that the contracting authority had entered into a contract without prior publication, when such publication was required, is sufficient to declare the contract null and void.

[4] Remedy 3: Damages

Remedy 3 – the right of a supplier to be compensated for harm caused by a public procurement law violation[32] – exists in a different procedural landscape than the judicial review cases. The jurisdiction has switched from the administrative courts to the general courts,[33] and the district courts[34] are the first instance courts. Chapter 20 section 21 of the SPPA provides that a claim for damages *must* be instituted at a general court. The procedure is regulated by the Swedish Code of Judicial Procedure (1942:740)[35] (the SCJP) applies to the procedure.

Notwithstanding the fact that an action for damages on public procurement law grounds *is* a damages claim (and, thus, falls within the jurisdiction of the general court system), it differs from other actions for damages. It is not a claim for contractual damages.[36] On the contrary, a missed contractual relationship between the claimant and the contracting authority – caused by an alleged illegal direct award to the benefit of one of the claimant's competitors – often forms the very basis of such a damages claim. However, despite the absence of a contractual relationship, the action cannot be considered a pure non-contractual damage claim.[37] It is 'something in between' and may be best described as a 'quasi-contractual' damage claim.[38] Depending on the circumstances, any supplier deprived from entering into a contract with a contracting authority due to a violation of public procurement law is entitled to compensation up to the amount of the positive contract interest.[39]

30. *See*, e.g., directive 2007/66/EC, preamble ss 13 and 14. *See also* the *travail prépatoire*, proposition 2009/10:180, p. 130.
31. Invalidity actions may be invoked in certain other situations as well, e.g., when a contracting authority has violated the stand still period by entering into contract during that period (*see* Chapter 20, s. 13 para. 2 of the SPPA).
32. The public procurement acts explicitly provide for such compensation (*see* Chapter 20, s. 20 of the SPPA).
33. Sw: allmänna domstolar.
34. Sw: tingsrätter.
35. Sw: rättegångsbalken (1942:740).
36. Sw: Inomobligatoriskt skadestånd.
37. Sw: Utomobligatoriskt skadestånd.
38. In Swedish case law regarding damages of public procurement law grounds, a procurement has been characterized as a 'quasi-contractual' relationship between the contracting authority and the suppliers (*see* the Swedish Supreme Court's ruling in NJA 1998 p. 873).
39. Sw: Positiva kontraktsintresset. Regarding damages on public procurements grounds, *see* further e.g., Andersson et al.: *Lagen om offentlig upphandling: En kommentar* (Juno Version 3), commentary to Chapter 20, s. 20 of the SPPA, and references made therein.

[C] Post-procurement Contract Disputes

When a procurement is finalized and the contract has been entered into, the contracting authority takes the role of a contractual party, with the winning supplier as the counterparty. Thus, it is a contractual relationship governed by private law, and subject to the rights and obligations of the contract. Like any party to a commercial contract, a contracting authority might have different types of disagreements with its counterparty, ultimately resulting in a contractual dispute. Further, like any other party to a commercial relationship, the contracting authority has an interest in effective mechanisms to resolve such contractual disputes.

The SPPAs are silent as to the question of how any post-procurement contract disputes between the contracting authority and the winning supplier ought to be resolved. Hence, general civil procedure rules apply. Pursuant to Chapter 10 section 2 of the SJCP, in civil cases 'the Crown may be sued at the place where the public authority charged with attending to the suit has its seat'. In order words, the competent court in action against the Swedish state is the court where the public authority, representing the state, has its seat. In addition, the general rule in Chapter 10 section 1 of the SJCP stipulates that the competent court for civil cases, in general, is the court for the place where the defendant resides.

As stated, the procurement documentation normally includes a draft contract, including general terms and conditions, as well as dispute resolution clauses. From a public procurement law perspective (in an open procedure), the content of the draft contract takes the form of mandatory requirements which the suppliers have to accept in order to participate.[40] Hence, in practice, it is up to the contracting authority, during the establishment of the procurement documentation, to decide the form of the resolution of any post-procurement contract disputes between the contracting authority and the winning supplier. Commonly, contracting authorities make use of the possibility set out in Chapter 10 section 17 of the SJCP to convey exclusive jurisdiction upon the court where the contracting authority resides. As discussed below, a contracting authority may also choose arbitration as the form of resolving post-procurement contract disputes (*see* further section §15.03[B]).

§15.03 POSSIBLE AREAS OF INTERACTION AND IMPLICATIONS

[A] Identification

With the introduction of the public procurement rules in the previous section in mind, we come to the very heart of this chapter: are there any areas of possible interaction between public procurement and arbitration? Is there a 'match' between these separate fields of law? In sections §15.02[B]–§15.02[C], the different cases where contracting

40. However, certain terms and conditions as such may be in violation with the public procurement rules (e.g., the principle of proportionality) and, consequently, open for a challenge in a review procedure.

authorities might face court procedures were examined. The author asked himself whether arbitration could be an alternative to court procedures in any, or all, of these cases. In the search for possible answers, the following 'scenarios' were identified:

- Scenario 1: Arbitration as an alternative to litigation in judicial review of procurement cases.
- Scenario 2: Arbitration as an alternative to litigation in non-contractual damages cases.
- Scenario 3: Arbitration as a way to solve post-procurement contract disputes between the contracting authority and the winning supplier.

In the following sections §15.03[B]–§15.03[C], Scenarios 1 and 2 will be explored briefly, while Scenario 3 will be examined in more detail.

[B] Scenarios 1 and 2: Arbitration as an Alternative to Litigation in (i) Judicial Review of Procurement Cases and (ii) Non-contractual Damages Cases

[1] Scenario 1

The idea behind *Scenario 1* is not the author's own. To the author's knowledge, it was first launched in the Swedish legal debate by two public procurement lawyers, Johan Stern and Björn Bergström of Ramberg Advokater. In an article published in 2017,[41] Stern and Bergström argued – in the light of the increasing and burdensome number of judicial review cases before the Swedish administrative court system – that arbitration *de lege ferenda* could be a tool for achieving more cost-effective and less time-consuming judicial review procedures. Concretely, the authors' proposed that contracting authorities should be given the opportunity to formulate a mandatory requirement in a procurement, stating that any judicial review would be subject to arbitration. Correspondingly, arbitral tribunals should be entrusted to handle judicial review cases. Stern and Bergström admitted that their proposal would require legislative amendments[42] but argued that such amendments could be made in a way (the article does not reveal how) that would make arbitration compatible with the Remedies Directives.

The Remedies Directives provide for a review procedure carried out by a 'body'.[43] No references are made to arbitral tribunals, but the Remedies Directives explicitly provide that bodies other than courts may be given the responsibility to carry out review procedures. Article 2(9) of 89/665/EEC, as amended by Directive 2007/66/EC, reads (author's emphasis):

41. https://upphandling24.se/tre-konkreta-forslag-att-hantera-overprovningsproblematiken/.
42. Obviously, e.g., the exclusive jurisdiction of the administrative courts set out in the public procurement acts as described in section §15.02[B][2] above.
43. Sw: Prövningsorgan.

> Where bodies responsible for review procedures *are not judicial in character,*[44] written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby *any allegedly illegal measure taken* by the review body or *any alleged defect in the exercise of the powers* conferred on it can be the *subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty* and independent of both the contracting authority and the review body.
>
> The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

It could be argued that it would indeed be possible, by legislative amendments, to establish that arbitral tribunals could be considered 'bodies' within the meaning of the Remedies Directives.[45] This could potentially be done within the provisions on challenge actions[46] contained in sections 33–36 of the Swedish Arbitration Act (the SAA), thus satisfying the request contained in the Remedies Directive, as quoted above, that 'any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it' may be subject to a judicial review by a 'court or tribunal within the meaning of Article 234 of the Treaty'.[47] Further, according to CJEU case law, different types of bodies – arbitral tribunals included – can be regarded as a court or tribunal within the meaning of Article 267 of the EU Treaty, provided that (i) they are established by law; (ii) they are permanent; (iii) their jurisdiction is compulsory; (iv) their procedure is *inter partes*; (v) they apply rules of law; and (vi) they are independent.[48]

Admittedly, careful in-depth analysis must, naturally, be conducted to create a system *de lege ferenda* where arbitration is used in judicial review of a procurement. It is not the author's aim to deliver all the legislative 'solutions' in this regard, within the

44. The Swedish version of the beginning of the first paragraph reads: *'Om de behöriga prövningsorganen inte är domstolar …'*.
45. To satisfy the requirements in the Remedies Directives (for standstill periods, interim measures etc.), similar rules as the current ones applicable in administrative courts would have to apply in any arbitration procedure.
46. Sw: klandertalan.
47. Now Art. 267 of the EU Treaty. To the author's understanding, a regular appeal model, similar to the on applicable in compulsory arbitration in buy-out of minority shareholders cases (*see* Chapter 22 s. 24 of the Swedish Companies Act (2005:551)) (Sw: Aktiebolagslag (2005:551)) could, alternatively, be considered.
48. Case C-555/13, *Merck Canada Inc. v. Accord Healthcare Ltd et al.*, paras 15–25, and references made therein. The CJEU (para. 17) also made clear that a 'conventional arbitration tribunal', due to its non-compulsory character – is *not* a court or tribunal within the meaning of Art. 267 of the EU Treaty (author's underscores): 'It should also be stated that a conventional arbitration tribunal is not a "court or tribunal of a Member State" within the meaning of Article 267 TFEU where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator […].'

framework of this chapter. However, to the author's understanding – and provided that the requirement in the Remedies Directives regarding standstill periods and interim measures are met – arbitration could *de lege ferenda* be used in the judicial review of procurement. This would be the case if one were to apply either of the two following, alternative viewpoints regarding the legal status of arbitral tribunals:

(c) The arbitral tribunal is *not* a court or tribunal within the meaning of Article 267 of the EU Treaty (i.e. because its jurisdiction is not exclusive) but with the possibility of a judicial review by a court.
(d) The arbitral tribunal *is* a court or tribunal within the meaning of Article 267 of the EU Treaty (which implies that its jurisdiction must be exclusive by law, which would then preclude a contracting authority from choosing arbitration (via a mandatory requirement in the procurement) at its own will).

[2] Scenario 2

The idea behind *Scenario 2* is to use arbitration as a way to solve a non-contractual damages claim between a supplier and a contracting authority.

> *Example 2*: Assume that a supplier, '*X*', accuses a contracting authority, '*Y*', of having breached the public procurement rules, e.g., in the form of an alleged illegal direct award. X claims it has suffered losses due to the public procurement violation and wants compensation. No contractual relationship exists between X and Y. However, X and Y share a common wish to have the dispute tried by arbitration rather than by court (e.g., to save time). Hence, X and Y enter into an arbitration agreement regarding the damages claim.

Arguably, legislative amendments would also be required for Scenario 2 to become a reality. Indeed, Chapter 20 section 21 of the SPPA (as referred to in section §15.02[B][4] above) could well be interpreted such that non-contractual damages claims on public procurement grounds fall within the exclusive jurisdiction of the general courts. However, on the contrary, the provision might be regarded as merely a dividing line between the administrative court procedure and civil procedure.[49] Viewed from that perspective, the provision would, arguably, not preclude the parties to a non-contractual damages dispute on public procurement grounds to agree on arbitration.[50] To the author's knowledge, the question has not been tried. Further, arbitration would be compatible with the Remedies Directives, provided that arbitral tribunals could be regarded as 'bodies' within the meaning of these directives (*see* section §15.03 [B] [1]).

49. Administrative courts do not have jurisdiction on damages claim and such claims, in presented in an administrative court, must be dismissed (Sundsvall Administrative Court of Appeal, Case 2489-13).
50. Indeed, in the light of the liberty of the parties to settle the dispute, it could be well questioned why they should be prohibited from agreeing on arbitration.

[3] Implications?

A common denominator of Scenarios 1 and 2 is the application by arbitral tribunals of the public procurement rules, i.e., EU directive-based law. Would this raise any problems? The short answer would – based on the author's conclusions from a Remedies Directives perspective in sections §15.03[B][1]–§15.03[B][2] –, simply be: 'no'. However, in light of the latest developments in the case law of the CJEU – commencing with the landmark *Achmea* case[51] – the question remains justified and must be addressed, or at least touched upon.

Naturally, one must bear in mind that *Achmea* and the cases following it – the *Komstroy*[52] and the *PL Holding Sàrl* cases[53] – concerned investment treaties disputes, and the question regarding the compatibility with EU law of submitting such disputes to arbitration. It could be argued that the rulings should be examined in this specific context and that they should not have any 'spill-over effects' to other possible areas of interaction between EU law and arbitration. This may be correct. However, the author cannot completely ignore the universal wordings of the CJEU. For example, paragraphs 45 and 46 of *PL Holding Sàrl* read (author's emphasis):

> By concluding such an agreement, the Member States which are parties to it *agree to remove from the jurisdiction of their own courts* and, therefore, from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law […] *disputes which may concern the application or interpretation of EU law*. Such an agreement is, therefore, capable of *preventing those disputes from being resolved in a manner that guarantees the full effectiveness of that law*.
>
> It is common ground that the arbitration clause in Article 9 of the BIT is, like the clause at issue in the case which gave rise to the judgment of 6 March 2018, Achmea (C-284/16, EU:C:2018:158), capable of leading to a situation *in which an arbitration body rules in disputes which may concern the application or interpretation of EU law*. Accordingly, that arbitration clause is such as to call into question not only the principle of mutual trust between the Member States but also the *preservation of the particular nature of EU law, ensured by the preliminary ruling procedure provided for in Article 267 TFEU* […].

What is the CJEU telling us? Is the message limited to the case of an arbitration clause in an investment treaty with an EU Member State as a party, and the incompatibility of such arrangement with EU law? Is merely the 'Member State issue' the problem here? Or, on a more universal level, that any arbitration clause in any contract – or even any arbitration arrangement – which leads to 'a situation in which an arbitration body rules in disputes which may concern the application or interpretation of EU law' will prevent 'those disputes from being resolved in a manner that guarantees the full effectiveness of that law' and is therefore incompatible with EU law? If the latter, is the dividing line between compatibility and incompatibility with EU law whether an arbitration arrangement would permit a preliminary ruling procedure or

51. Case C-706/17.
52. Case C-741/19.
53. Case C-109/20.

whether it would not? If so, that would take us back to the question of whether an arbitral tribunal can be regarded as a court or a tribunal within the meaning of Article 267 of the EU Treaty.

If the findings of the CJEU in *PL Holding Sàrl* in line with the above are to be universally applied, it is likely that a floodgate will open. In its most extreme form, such a scenario would run the risk of establishing a great barrier between EU law and arbitration. Needless to say, that would have a much greater impact than, and go far beyond, the question of the possibilities of the public procurement rules being applied and interpreted by arbitral tribunals. Indeed, the 'extreme form scenario' – arguably highly unlikely – would be contrary to current Swedish legislation as well as to a general view that EU law, e.g., EU competition rules, in fact, is arbitrable.[54] Future developments will have to tell. It is sufficient for the purposes of this chapter, to conclude that the current uncertainty regarding the relationship between arbitration and EU law would probably have an adverse effect on any legislative amendments (if they were ever to be considered by the legislator) enabling Scenario 1 (and Scenario 2 in case arbitration in that scenario is not possible already *de lege lata* – *see* section §15.03 [B] [2]) to become a reality.

[C] Scenario 3: Arbitration as a Post-procurement Dispute Resolution Mechanism

[1] General

In preparing for this chapter, the author searched for statistics regarding the use of arbitration clauses in public contracts, and contacted the SCA, the regulatory body on public procurement issues in Sweden, to request such statistics. The SCA in turn suggested contacting the Swedish National Agency for Public Procurement. That agency was also unable to help. The officer spoken to, who was specialized in collecting public procurement statistics, had not heard of such statistics.

The author turned to the Swedish legal literature. Was there anything written on the use of arbitration clauses in public contracts and the frequency of such use? The results were scant. One work on the law applicable to municipality-owned companies was found, which touched on the subject.[55] The authors of that work, while not rejecting the use of arbitration clauses in public contracts, argued that contracting authorities should, in most cases, refrain from such use in public procurement.[56] Now, what would the reason be for such restrictive attitude towards arbitration as a dispute resolution mechanism in commercial relationships involving public bodies? According to the authors, one of the major advantages of arbitration – the possibility to keep the

54. *See,* e.g., Lindskog: *Skiljeförfarande: En kommentar* (Juno Version 3), 1 § ss 4.2–4.3. *See also* e.g., Karlsson et al.: *Konkurrensrätt: En handbok* (Juno Version 6), s. 6. Pursuant to s. 1, 3 paragraph, of the SAA, arbitrators may rule on the civil law effects of competition law as between the parties.
55. Adrell et al., *Juridik i kommunala bolag: En praktisk guide* (Juno Version 2).
56. *Ibid*., s. 10.5.2.

procedure confidential – does not apply to bodies which are subject to the principle of public access to official records.[57] In a way, this is true.[58] However, many advantages of arbitration remain applicable to contracting authorities, in their capacity as parties to commercial contracts. It might be, for example, the time efficiency of arbitration and/or the possibility of selecting arbitrators, the latter potentially a critical issue in highly technically complex procurements resulting in highly technically complex contracts. It might also be the question of enforcement, potentially a critical issue in public procurements which attract foreign suppliers. Arbitration could undoubtedly be beneficial to contracting authorities as a way of solving contract disputes. There should be space for Scenario 3.

And *there is* room for Scenario 3. It really exists *de lege lata*. Contracting authorities *do*, from time to time, include arbitration clauses in the draft contract in the procurement documents, making the arbitration agreement a mandatory requirement which every participating supplier must accept, to have a chance of being selected and awarded the contract.[59] Correspondingly, provisions making arbitration the mechanism to solve any post-procurement disputes arising from the contract are sometimes included.[60] Hence, the question is not what the conditions or possible implications are for Scenario 3 to become a reality. Rather, one can ask whether there are any implications for Scenario 3 to *continue to be a reality* and what challenges, if any, arise from the fact that a contract subject to arbitration is the product of public procurement. These questions will be addressed below.

[2] Possible Implications and Challenges

The author once heard, probably during his time as a law student at Uppsala University, that law, in fact, was nothing but 'frozen' politics. Political wills and visions are formulated and transformed into legislation, and subsequently handed over to the judicial system. Heavily simplified, maybe, and some would even say inaccurate. But

57. Sw: offentlighetsprincipen.
58. In the author's view, the question of the principle of public access to official records should not be exaggerated. Indeed, to some extents, the commercial relationship with a body which are subject to the principle of public access to official records would possible be covered by provisions in the Swedish Public Access to Information and Security Act (2009:400) (Sw: Offentlighets- och sekretesslagen (2009:400)). Further, an arbitration as such does not guarantee secrecy for any party, public or private. For example, an award may be made public, via the court system, in case of a challenge action.
59. It can be noticed that procurements pertaining to arbitration as such are excepted from the public procurement rules (Chapter 3, s. 21 of the SPPA).
60. One, recently well-observed, example is AB Storstockholms Lokaltrafik's (SL) procurement of a metro signalling system in 2010. The contract included an arbitration clause (stipulating SCC rules) and was eventually awarded to Hitachi Rail Sweden STS Sweden AB ('Ansaldo'). Many years later, in 2017, SL rescinded (Sw: hävde) the contract and the parties ended up in arbitration. In a separate award, rendered on 25 February 2021, the arbitral tribunal ruled that the rescindment of SL constituted a breach of contract and that Ansaldo was entitled compensation for damages and certain costs. In a final award, rendered on 10 December 2021, Ansaldo was awarded 500 MSEK. SL has initiated a challenge action (Svea Court of Appeal, Cases T-4968-21; pending).

still appealing to any legal positivist: The law depends on politics – the former is the result of the latter – and does not exist by nature. But despite their close relationship, politics and law are not the same. They co-exist and might interact, but they are different disciplines and must not be confused.

The relationship between politics and law raises the issue of the relationship between the public procurement rules and the subsequent contractual relationship between the contracting authority and the winning supplier. Such a contractual relationship emanates from the public procurement rules. It is 'frozen' public procurement, the result of a competitive tender procedure and the application of the principles of equal treatment, transparency etc. The parties to a public contract might feel the presence of the public procurement rules during the performance of the contract, like a watchdog in the shadow. As noted above, the public procurement rules prohibit public contracts from being substantially modified.

However, it is crucial to keep in mind that, notwithstanding its origins, the contract between a contracting authority and a supplier is *not* governed by the public procurement rules: it is subject to private law. The public procurement rules and private law might face each other and even interact, but they are not the same.[61] Any contract dispute between a contracting authority and a supplier will primarily be resolved in accordance with the contract, and pursuant to private law and its principles. That, in turn, leads to the first conclusion in this section: It is submitted that any possible implications regarding the application of EU law by arbitral tribunals as discussed above (*see* section §15.03[B][3]) are not relevant here. In Scenario 3, an arbitral tribunal will *not* apply the public procurement rules as such.

Do any implications or other challenges, i.e., risks of clashes between the public procurement rules and arbitration, remain? Could the watchdog potentially come out from the shadows, barking angrily? Maybe. To exemplify.

> *Example 3*: Assume that a contracting authority '*X*', after conducting a public procurement, has entered into a contract with a supplier, '*Y*'. The dispute resolution clause in the contract stipulates that any disputes shall be resolved by litigation. X and Y end up in disagreements over certain performances under the contract. However, they agree on the advantages of having the dispute resolved by arbitration. Hence, X and Y enter into a supplementary contract, amending the dispute resolution clause from litigation to arbitration. Supplier Z finds out about the modification of the contract and initiates an invalidity action on the argument that the modification is substantial. Maybe Z was a former participant in the procurement and now argues it would have been able to offer a more attractive price and, hence, submit a more competitive tender, had arbitration been a prerequisite in the first place. Or maybe Z did not participate in the procurement

61. Several of the provisions in the public procurement act have a 'private law dimension' insofar they prescribe how actions under private law, should be carried out, and also limit the private law freedom of the contracting authority. *See,* e.g., Chapter 7, s. 2 of the SPPA which stipulate that a framework agreement may have a term exceeding four years only if there are specific reasons therefore, and Chapter 10, s. 10 of the SPPA which stipulates that a contracting authority shall state the period during which the supplier shall be bound by its tender.

and now argues it would have done so, had arbitration been a prerequisite in the first place (maybe Z is a non-Swedish supplier who, for some reason, wants to avoid ending up in a contract dispute before Swedish courts).

Example 4: Assume that the same X and Y have entered into the contract, but without previous publication and call for competition, perhaps because X argued that the acquisition is covered by an exception from the scope of the public procurement rules. The contract includes an arbitration clause. The same Z finds out about the contract between X and Y and initiates an invalidity action.

Now, assume that Z is successful with the invalidity actions in examples 3 and 4. The contract is declared null and void by an administrative court. What about the arbitration agreement in such a scenario? While the answer, from an arbitration law perspective, might require a complex analysis and thoughts on *the principle of separability* and other, different, considerations, the answer from a public procurement law perspective is, to the author's understanding, straight-forward: the arbitration agreement is invalid *ex tunc* under private law and cannot successfully be invoked. But what happens if an arbitral tribunal has already rendered an award prior to the decision on invalidity? Here, things become complicated. Obviously, if the arbitration agreement is deemed to be null and void *ex tunc*, it is deemed never to have existed. Consequently, the award cannot be regarded as being based on an arbitration agreement, and, if so, any enforcement of the award would, to the author's understanding, be impossible.[62]

Naturally, the potential clash between arbitration and the public procurement rules might have additional angles and is certainly open for further and more in-depth analysis. The intention for the purpose of this chapter is merely to address the subject and touch upon its surface. Finally, however, in this section, a few words are required regarding the interpretation of public contracts, which is what any arbitrator appointed to solve a post-procurement contract dispute must do. Although the public procurement rules are not directly applicable in a post-procurement contractual relationship between a contracting authority and a supplier, the specific origin of a public contract must not be ignored when interpreting it. As the Swedish Supreme Court expressed it in a recent landmark ruling in this field, NJA 2021 p. 643: an interpretation of a public contract must be made pursuant to an overall assessment of the contract and its purpose, taking into consideration the public procurement context of the contract.

For example, the aim to identify the *common will of the parties*, crucial in contractual interpretation pursuant to Swedish law, is often irrelevant for public contracts. The reason is simple: it is the contracting authority that – by identification of the scope of the procurement and stipulation of the mandatory requirements – has 'run the show' (albeit restricted by the public procurement rules and the fundamental principles of these rules). The supplier is a mere passenger, forced to accept the prerequisites in the procurement. Although, admittedly, the influence of the supplier will vary, depending on the procurement procedure used, the public procurement

62. Chapter 3, s. 15 of the Swedish Enforcement Code (1981:774) (Sw: Utsökningsbalk (1981:774)).

procedure can very seldom be compared with the procedure preceding a private commercial contract conducted by two equal parties.

Another example is the relevance – or rather irrelevance – of *subsequent actions* taken by the parties when interpreting a public contract.[63] Obviously, a natural reply from any contracting authority to an argument of a supplier that subsequent actions should be taken into consideration when interpreting a public contract would be that such interpretation in fact would be equal to a *modification of the contract*, in breach of the public procurement rules and never intended by the contracting authority. Hence, the public procurement rules might still be of relevance during the contract period, not in the way of *application* but as contract *interpretation*.

Additional examples may be added but I leave it here with the following conclusion: Any arbitrator appointed to solve a public contract dispute should have the ability to navigate in the specific legal terrain from which the contract in question emanated – the public procurement field.

§15.04 FINAL REMARKS

This chapter was borne out of the author asking himself what different roles arbitration might play in public procurement-related disputes. To refer to the title of this chapter: is there a match between arbitration and public procurement? The possibilities *de lege ferenda* of using arbitration in the judicial review of procurement cases, and non-contractual damages claims on public procurement law grounds, were explored, and the article concluded with a discussion of arbitration as a post-procurement contract dispute resolution mechanism *de lege lata*. If there is a match between arbitration and public procurement, it is primarily to be found in the latter.

The conclusion probably needs an immediate modification. As stated, public procurement rules are not directly applicable in a post-procurement contractual relationship between a contracting authority and a supplier. Hence, the arbitration match is with a public procurement *environment* rather than with the public procurement *rules*.

Just like any other parties to a commercial contract, a contracting authority might identify the benefits of arbitration for a specific contract, and, indeed, has the right to choose it as the mechanism for resolving disputes arising from such a contract. From this perspective, arbitration certainly plays a role in public procurement-related disputes. But the watchdog will always be there, in the shadows. And the arbitrators set to rule on a post-procurement contract dispute will have to take notice of its potential bark. And bite!

63. *See,* e.g., Ramberg, *Allmän avtalsrätt* (Juno Version 11), Chapter 9, s. 7.