CHAPTER 13

The *Belgor* Case Four Years On: Under What Circumstances May a Decision to Restrict a Party's Right to Present Its Case Be Deemed Unjustifiable?

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§13.01 INTRODUCTION

An important part of an arbitral tribunal's management of the arbitration is to move the proceedings forward by issuing procedural decisions. These types of decisions often involve balancing the need for efficiency in the proceedings against a party's right to present its case.

In the *Belgor* case,[1] the Swedish Supreme Court stated that an arbitral tribunal's decision to deny a party's request for an extension of time does not constitute a procedural irregularity unless the decision is *unjustifiable* (my italics).[2]

The Supreme Court did not explain the precise meaning of the term "unjustifiable," and the concept has not appeared in later Supreme Court precedent. In the absence of such precedent, this chapter examines how the term "unjustifiable" has been applied in proceedings before the Svea Court of Appeal concerning the setting aside of an arbitral award under the first paragraph of section 34(7) of the Swedish Arbitration Act (the "Act") due to alleged procedural irregularities.[3]

* The author is grateful to juris doktor h.c. advokat Finn Madsen for his valuable comments on the chapter.

1. Swedish Supreme Court Case No. NJA 2019 p. 171.
2. An English translation of the *Belgor* case can be found on the SCC Arbitration Portal: https://www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal/start/.
3. According to the first paragraph of section 34(7) of the Act, an arbitral award shall be wholly or partially set aside upon the request of a party if, without fault of the party, an irregularity occurred in the course of the proceedings which probably influenced the outcome of the case.

The purpose of this chapter is to answer the following questions:

(1) What is the *scope* of the term "unjustifiable"? Is the term relevant for the assessment of procedural decisions other than an arbitral tribunal's decision to deny a request for an extension of time?
(2) What is the *meaning* of the term "unjustifiable"? What circumstances are relevant to the interpretation of the term?

This chapter does not discuss the requirement set forth in section 34(7) of the Act that, in order for the award to be set aside, the challenging party must demonstrate that the procedural irregularity probably influenced the outcome of the case, although it should be noted that this is a key requirement that the challenging party needs to satisfy.

§13.02 THE *BELGOR* CASE

[A] Circumstances of the Case

The Belarus company Joint Stock Company Belgorkhimprom (Belgor) and the Turkish company Koca Inşaat Sanayi Ihracat Anonim Şirketi (Koca) had entered into a construction contract. Following Belgor's cancellation of the contract, Koca initiated arbitral proceedings. Belgor disputed Koca's claim and filed a counterclaim. The arbitral tribunal rejected Belgor's claim and ordered Belgor to pay compensation to Koca.

Following Belgor's challenge of the award, it was partially set aside by the Svea Court of Appeal. Belgor appealed to the Supreme Court, seeking that the award be set aside in full. Belgor submitted several grounds for its request, including that the dispute was not covered by a valid arbitration agreement. The legal ground for the challenge of relevance to this essay was Belgor's argument that Belgor had been denied the right to present its case.

Belgor argued that the arbitral tribunal's decision to deny Belgor's request for an extension of time to submit an expert report constituted a procedural irregularity and that the award should be set aside on the basis of the first paragraph of section 34(7) of the Act. Belgor also argued that a procedural irregularity had occurred when the arbitral tribunal had denied Belgor's request that the tribunal appoint an independent expert. According to Belgor, the Arbitral Tribunal's decisions deprived Belgor of the opportunity to prove defects in Koca's work. Belgor stated that the procedural irregularity was not caused by Belgor and that it had influenced the outcome of the case.

The Supreme Court stated:

> 39. Within the framework of the management of the case, the arbitral tribunal must give the parties the opportunity to present and argue their respective cases to the extent necessary (Section 24, first paragraph of the Act and the SCC Arbitration Rules 2010, Article 19.2). In an arbitration under the SCC Arbitration Rules, the

> arbitral tribunal is entitled to conduct the arbitration in any manner it considers appropriate. A provisional timetable must be established. The arbitral tribunal has mandate to decide, amongst other things, when written statements are to be submitted, including any other documents the parties wish to rely upon. The tribunal and the parties should act in accordance with the adopted provisional timetable. The tribunal may grant a party an extension of time unless the extension is considered inappropriate. In that assessment, it should be taken into account at what stage of the proceedings the decision is made, the effect that the extension may have on the other party, and any other relevant circumstances (*see* Arts. 19 and 23-25 of the SCC Arbitration Rules).
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> 40. The arbitral tribunal is best placed to consider the reasons presented by the parties, and to assess whether a request for an extension should be granted or denied. As a starting point, the decision of the arbitral tribunal should be upheld, unless the decision appears unjustifiable. In this assessment, case law concerning article V 1 (b) of the New York Convention is of relevance (*see* Supreme Court Case No. NJA 2018 p. 291, "Robot Grader," para. 15).
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> 41. A second prerequisite for the setting aside of an award due to a decision concerning a time extension, is that the challenging party did not cause its own predicament. For the award to be set aside, the challenging party must demonstrate that, due to circumstances beyond his control that he was not obligated to have foreseen, he was prevented from presenting his case in time. Furthermore, the party must demonstrate that alternative ways of presenting the case did not exist.
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> 42. A rejection of a party's request that the arbitral tribunal appoint its own expert cannot constitute a procedural irregularity, unless otherwise provided by the arbitration agreement.

In paragraphs 44-45 of the judgment, the Supreme Court took into account that the arbitral tribunal had rejected Belgor's request since an extension would have resulted in a postponement of the final hearing. Furthermore, the Supreme Court noted that the arbitral tribunal, in its decision, had stated that it would be possible for Belgor to submit a supplement to the expert report at a later stage. The Supreme Court noted that the expert report was primarily of relevance to Belgor's counterclaim. Therefore, it was possible for Belgor to withdraw the counterclaim and initiate new arbitration proceedings at a later stage. In paragraph 47, the Supreme Court found that Belgor had not demonstrated that the arbitral tribunal's decision was unjustifiable.

[B] The *Belgor* Case in the Swedish Jurisprudential Debate

Belgor has given rise to much debate in Sweden. As to the scope and the meaning of the term "unjustifiable," the following statements are of particular interest.

Based on the above-cited paragraphs 40-41 of the Supreme Court's judgment, Patrick Schöldström states that the term "unjustifiable" sets a very high bar. He does not object to this since the arbitral tribunal's case management, more often than not, consists of balancing more or less incompatible considerations, sometimes under time pressure. Schöldström questions whether an equally high bar can or should apply not only to issues regarding a party's right to a time extension but also to other procedural decisions or even the handling of the case in general. According to Schöldström, paragraph 41 of the Supreme Court's judgment seems to imply that the tribunal's

decision should first of all be tested against the requirement contained in section 24 of the Act; the arbitrators "shall give the parties the opportunity to present their case to the extent necessary." If that requirement has not been met, the tribunal's decision must be regarded as unjustifiable.[4]

Stefan Lindskog states that the "unjustifiable" requirement applied by the Supreme Court appears to be quite onerous but that the requirement, nevertheless, can be justified when the party, despite a denial of its request for a time extension, has certain leeway. Consequently, the level of tolerance should depend on the effect of the tribunal's decision. Whether the tribunal has provided reasoning for its decision should also be of importance. If the arbitration panel has not adequately presented the grounds for its position, the scope for a challenge of the award should be greater than when the panel has done so.[5]

Oscar Gentele argues, in line with *Belgor*, that the arbitrators are in the best position to assess whether new material should be accepted or rejected, considering the reasons given by the parties. Consequently, if a decision to reject or allow new material is to be reviewed based on a motion to set aside the award, the court should not perform a de novo review of the decision, thus acting as if it were considering the question for the first time. Instead, the court must grant significant deference to the arbitrators' decision. An award must, as a starting point, be affirmed unless the court finds that the decision to allow or reject new material was unjustifiable. Oscar Gentele notes that the Supreme Court did not explain in *Belgor* when a procedural ruling is unjustifiable. He refers to US court rulings, which have applied an abuse of discretion standard to arbitrators' procedural rulings in annulment actions. This standard would involve reviewing whether the decision-maker has made a clear error of judgment or has applied an incorrect legal standard.[6]

§13.03 JUDGMENTS FROM THE SVEA COURT OF APPEAL, 2019-2022

I have identified three decisions of the Svea Court of Appeal where the term "unjustifiable" has been applied with reference to *Belgor* since 2019.[7] In all three cases, the challenging party invoked the first paragraph of section 34(7) of the Act and argued that a procedural error had been made since the challenging party was not afforded a right to present its case. In two of the cases, the challenging party also argued that the parties had not been treated equally. The cases are presented chronologically below.

4. *See* Patrick Schöldström, Juridisk Tidskrift 2019/20, 249.
5. *See* Stefan Lindskog, *Skiljeförfarande—en kommentar*, JUNO v 3, re section 34 p. 7 of the Act, para. 5.2.1.
6. *See* Oscar Gentele, Stockholm Arbitration Yearbook 2019, 155.
7. The review includes Svea Court of Appeal judgments rendered from March 20, 2019 until March 13, 2023.

[A] The *BDO* Case

Svea Court of Appeal judgment dated June 10, 2021, in Case No. T 13364-19, *Hans L v. The Partners of BDO* (the "Partners")

This case concerned the question of whether new information invoked by a party at a late stage of proceedings should have given rise to a reopening of the proceedings in order to give the challenging party the opportunity to comment on the new information. Both parties to the arbitration were Swedish. The facts of the case were, briefly, the following.

The Partners requested that the award be set aside in its entirety due to procedural error. The arbitration agreement included a reference to the Rules for Expedited Arbitration of the Stockholm Chamber of Commerce's Arbitration Institute.

The Partners claimed that the arbitrator had allowed Hans L to invoke, in his closing statement, a new factual ground in support of his case. Even if Hans L's statement should not be regarded as a new factual ground, it constituted, according to the Partners, an "addition" according to Article 31 of the SCC Rules for Expedited Arbitration.[8] By deciding to deny the Partners' motion to disregard Hans L's statement or, alternatively, that the proceedings be reopened, the arbitrator had deprived the Partners of their right to respond to Hans L' statement. The Partners should have been given the opportunity to comment on the statement regardless of whether the statement was merely a comment on the Partners' evidence.

Hans L opposed the Partners' motion, stating, in short, that no new facts were presented during his closing remarks. The purpose of Hans L's statement was merely to point out flaws in the evidence relied upon by the Partners. The proceedings were closed at the final hearing after the parties' closing statements. There was no ambiguity as to whether the proceedings were closed, nor were there sufficient reasons for reopening the proceedings.

The Svea Court of Appeal stated that the arbitrator, taking into account the SCC rules and the parties' instructions, may handle the arbitration in the manner the arbitrator deems appropriate. The arbitration should always be managed in an impartial, efficient and expeditious manner which, taking into account the expedited nature of the procedure, should give the parties equal opportunity to present their case to a reasonable extent. Pursuant to Article 41 of the SCC Rules, the arbitrator should declare that the proceedings are closed when the arbitrator is satisfied that the parties have had a reasonable opportunity to present their cases. Thereafter, before a final award has been made, the arbitrator may only reopen the proceedings on his own initiative or at the request of a party in exceptional circumstances.

8. According to Art. 31 of the SCC Rules for Expedited Arbitration, a party may, at any time prior to the close of proceedings, amend or supplement its claim, counterclaim, defense or set-off provided its case, as amended or supplemented, is still comprised by the arbitration agreement, unless the Arbitrator considers it inappropriate to allow such amendment or supplement having regard to the delay in making it, the prejudice to the other party or any other relevant circumstances.

The Svea Court of Appeal noted that, according to section 24 of the Act, a party's right to present its case includes the right to be given the opportunity to respond to the other party's statements. A party is entitled to present its case only to the extent necessary, and the party should not be allowed to delay the proceedings. The arbitrator must determine a time for the closing of the proceedings, after which time no new material may be brought into the proceedings. This can be done by ordering the parties to complete their case in writing. When a final hearing has been held, the proceedings should generally be considered to have ended after the hearing.[9]

The Svea Court of Appeal stated that the requirement that the parties be granted an opportunity to present their case is a fundamental aspect of the rule of law. A decision depriving a party of this opportunity may constitute a procedural error, which may result in the award being set aside. With reference to *Belgor*, the Svea Court of Appeal noted that the arbitral tribunal is best placed to assess, in light of the parties' arguments, whether a request for an extension of time should be granted or denied and that the starting point is that the arbitral tribunal's decision should be affirmed unless it appears unjustifiable.

The Court of Appeal found that the arbitration proceedings, according to Article 41 of the SCC Rules, had been closed at the end of the hearing and that the parties had understood this. The Court of Appeal then carried out a thorough analysis of the arbitrator's decision to deny the Partners' motion to either disregard Hans L's statement or to reopen the case and give the Partners the opportunity to comment on Hans L's remarks.

The Svea Court of Appeal held that the arbitrator, in his decision, had stated that the remarks made by Hans L during his closing statement were comments on the Partners' evidence and not a change of the factual grounds for his position in the case. According to the Court of Appeal, the arbitrator's decision did not deprive the Partners of their right to present their case to the extent necessary. The arbitrator's decision not to resume the proceedings did not, therefore, constitute a procedural error.

[B] The *Transgaz* Case

Svea Court of Appeal judgment dated October 8, 2021, in Case No. T 8181-19, *GTB Transgaz Belarus ("Transgaz") v. Energoprojekt Oprema a.d. Beograd ("EPO")*

The parties to the arbitration were from Belarus and Serbia. The facts of the case were, in brief, the following.

The parties had entered into a construction contract. Transgaz terminated the contract, invoking an alleged delay by EPO as a cause for the termination. EPO initiated

9. The Svea Court of Appeal referred to the legislative history of the Act (Govt. Bill 1998/99:35, 226) and to Lindskog, *Skiljeförfarande*, re section 24 of the Act, point 4.1.6. Stefan Lindskog's commentary to the Act concerns mainly Swedish domestic arbitrations. The commentary is, nonetheless, often quoted by the Svea Court of Appeal in challenge proceedings concerning both domestic and international arbitrations.

arbitration, and Transgaz filed a counterclaim. In the arbitral award, EPO's claim was upheld, but the arbitral tribunal held that Transgaz's termination was unfounded.

In its motion to set aside the award, Transgaz argued that the arbitral tribunal's decision to grant EPO an extension of time to argue its claim constituted a deviation from the agreed timetable in Procedural Order no 1. The decision had created unequal conditions for the parties to present their respective cases.

EPO opposed Transgaz's motion, arguing that the arbitral tribunal's decision had been correct and in accordance with Article 23 of the SCC Arbitration Rules, the Act, and Procedural Order no 1. The EPO argued that the arbitral tribunal was best placed to make decisions on procedural matters.

The Court of Appeal held that an arbitral tribunal may adapt the management of the proceedings to the nature of the dispute and to the parties' instructions. However, the requirements of the rule of law must be complied with, and the parties must be granted an adequate opportunity to present their cases. As a consequence, the parties must be treated impartially, and the proceedings must be transparent and reasonably foreseeable for the parties. With reference to *Belgor*, the Court of Appeal stated that the arbitral tribunal's decision must be upheld unless it is unjustifiable.

The Court of Appeal stated that when a motion to set aside an award concerns a procedural decision, the Court's assessment of the decision should primarily focus on how the arbitral tribunal reached its decision rather than on the substance of the decision. This means, according to the Court of Appeal, that if the arbitral tribunal properly reported the reasons for its decision, the decision should normally be upheld. However, if, for example, the arbitral tribunal did not provide reasoning for its decision and the decision concerns an issue that was essential for a party's ability to present its case, the Court should assess the issue at hand and decide on the issue in the arbitral tribunal's stead. In such a situation, the Court may conclude that a procedural error has been made.[10]

In its examination of the arbitral tribunal's decision, the Court of Appeal found that the arbitral tribunal had given Transgaz the opportunity, during the hearing, to make a separate statement in response to the written statement submitted by EPO and that Transgaz had, in fact, availed itself of this opportunity. Transgaz had also been given the opportunity to respond to the submission in writing after the hearing. In light of this, the Court of Appeal found that Transgaz had been given an adequate opportunity to present its case and that the parties had been treated equally. The arbitral tribunal's decision was not unjustifiable, and no procedural error had been committed.

[C] The *ICA* Case

Svea Court of Appeal judgment dated June 30, 2022, in Case No. T 7158-20, *ICA Sverige AB ("ICA") v. Bergsala SDA AB ("Bergsala")*

10. The Svea Court of Appeal referred to Stefan Lindskog, *Skiljeförfarande—En kommentar*, JUNO version 3, re section 34 of the Act, para. 5.1.3.

The main issue in this case was whether the challenging party's right to present its case was unduly restricted when the arbitral tribunal, over the challenging party's objection, decided that the hearing should be held virtually and not physically. Both parties to the arbitration were Swedish. The relevant facts of the case were, in brief, the following.

ICA and Bergsala had entered into a master agreement, according to which Bergsala would sell products to ICA and/or other companies within the ICA group. In 2018, a dispute arose between the parties regarding the purchase of products. On May 13, 2019, Bergsala initiated arbitration against ICA. ICA filed a counterclaim. The arbitral award was issued on June 11, 2020. ICA was ordered to pay the amount sought by Bergsala. ICA was awarded only a small part of its counterclaim.

ICA requested that the arbitral award be annulled in accordance with section 33 of the Act.[11] ICA requested, alternatively, that the award be set aside in accordance with section 34 of the Act.

ICA's grounds for the request for an annulment were that the award was manifestly incompatible with the foundations of the Swedish legal system. ICA argued that the arbitral tribunal had refused to grant ICA an oral hearing, that the virtual hearing did not guarantee the equal treatment of the parties, and that the principle of party autonomy had been infringed since the arbitral tribunal's decision to conduct a virtual hearing had placed Bergsala in a better position in the arbitration than ICA. Alternatively, ICA argued that the award should be set aside as the arbitral tribunal's decision to conduct a virtual hearing violated ICA's right to an oral hearing under section 24 of the Act and the right to a hearing under Article 32 of the SCC Arbitration Rules. These rules required, according to ICA, that the hearing be physical. In addition, ICA argued that independent of its right to an oral hearing, its right to due process had been violated by the arbitral tribunal's decision. ICA argued that the travel restrictions during the COVID-19 pandemic had resulted in ICA not being able to meet with its witnesses and legal representatives. This meant, according to ICA, that the case could not be prepared satisfactorily and that it could not be presented in a manner consistent with due process. Furthermore, ICA argued that the credibility of the witnesses in the dispute was of particular importance and that the virtual hearing did not allow for an adequate witness hearing.

Bergsala objected to ICA's requests and argued that the timetable had been agreed jointly by the parties. Furthermore, Bergsala had already been forced to accept a postponement of the proceedings since ICA had not presented its final claims until March 2020. Bergsala argued that a physical hearing could have been carried out in a safe way with both parties present despite the COVID-19 pandemic and that the arbitral tribunal's decision to cancel the physical hearing was a result of ICA's refusal to participate.

The Court of Appeal noted that the term "oral hearing" is not defined in section 24 of the Act. Furthermore, the Court of Appeal noted that section 24 of the Act should,

11. According to section 33 p. 2 of the Act, an award is null and void if the award, or the manner in which the award was made, is manifestly incompatible with the basic principles of the Swedish legal system.

according to the legislative history of the Act, be interpreted based on the Swedish Code of Civil Procedure in Swedish domestic arbitration and in accordance with the right to a fair trial under Article 6 of the European Convention on Human Rights.

The Court of Appeal stated that if the parties are unable to agree, the question of when a hearing should take place and what form it should take falls within the arbitral tribunal's discretionary authority.

Furthermore, the Court of Appeal stated that according to Chapter 5, section 10 of the Swedish Code of Civil Procedure, a hearing may, under certain circumstances, be held even though the court, the parties and the witnesses are not physically present. The Court of Appeal held that the right to a physical hearing under the Swedish Code of Civil Procedure is not absolute. Consequently, section 24 of the Act and the SCC Arbitration Rules do not rule out a virtual hearing. The Court of Appeal stated that unless the parties have agreed otherwise, it falls within the arbitral tribunal's discretionary authority to decide whether the hearing should be held virtually, notwithstanding that one of the parties has objected to the hearing being conducted in that manner.

Furthermore, the Court of Appeal stated that, when deciding whether a virtual hearing should be held despite the objection of one of the parties, the arbitral tribunal must decide whether a virtual hearing is *appropriate* in the circumstances of the case. In this assessment, according to section 24 of the Act, the arbitral tribunal must balance the parties' rights to present their case against the requirement that the dispute be handled impartially, expediently and quickly under section 21 of the Act. The technology used during the hearing must enable sufficiently good communication. The Court of Appeal referred to *Belgor* and stated that the arbitral tribunal's decision must not, from an overall point of view, appear unjustifiable.

As to the circumstances of the case, the Court of Appeal found that the arbitral proceedings had been pending for a year at the time of the arbitral tribunal's decision. Furthermore, at the time of the decision, it was unclear how long the pandemic would continue. There was, consequently, a strong interest for the arbitration to not be further delayed. The Court of Appeal found that the technical conditions during the hearing had been acceptable. Furthermore, the arbitral tribunal had given the parties an opportunity to take part in a physical hearing in May and June. ICA had stated, due to the pandemic and due to health issues affecting ICA's legal counsel, that it was unable to participate in the physical hearing and sought a postponement until August. The reasons given by ICA did not constitute an obstacle to the hearing. For that reason, according to the Court of Appeal, ICA had not been deprived of its right to a hearing.

The Court of Appeal concluded that, from an overall point of view, the proceedings had been conducted in accordance with due process and that the parties had been given an opportunity to present their cases. The arbitral proceedings had been handled impartially, expediently and quickly. No procedural error had been committed, and there were no grounds to set aside the award.

§13.04 ANALYSIS

In the following section, the questions posed in the introduction will be analyzed in light of the Svea Court of Appeal's judgments.

[A] What Is the Scope of the Term "Unjustifiable"?

One of the purposes of this chapter is to examine whether the term "unjustifiable" is relevant to the assessment of whether procedural decisions other than an arbitral tribunal's decision to deny a motion for an extension of time may constitute a procedural error under the first paragraph of section 34(7) of the Act.

The review of the Court of Appeal cases suggests that the court has held that the term "unjustifiable" has a broader scope than what directly follows from *Belgor* and that the term is also relevant for assessing procedural decisions other than a denial of a motion for an extension of time. Is the term relevant for the assessment of all procedural decisions?

The enquiry that presented proposals for the revisions of the Act that entered into force on March 1, 2019, proposed an amendment of the provision concerning challenge due to procedural error, to the effect that only gross errors by the tribunal should result in the award being set aside.[12] However, that proposal was not included in the revised Act. In the *travaux préparatoires* to the revised Act, it was stated that the proposed amendment would impede the possibilities of setting aside the award when a procedural error has influenced the outcome of the case and that such a provision would be difficult to justify.[13]

According to the Supreme Court in *Belgor*, the decision of the arbitral tribunal should hold unless the decision is deemed unjustifiable. The Supreme Court did not clarify whether this means that only gross errors committed by a tribunal are challengeable. In light of the aforementioned statement in the *travaux préparatoires*, namely that all errors affecting the outcome are challengeable, it can be surmised that an unjustifiable error can cause the award to be set aside only in cases where the challenged decision is of a *discretionary* nature.[14] In other words, it may be concluded that the criterion "unjustifiable" only applies to procedural decisions which require that an assessment or a balancing of the parties' respective interests is made by the arbitral tribunal. Other errors, which are not the result of an erroneous assessment by the arbitral tribunal, may result in the award being set aside regardless of whether the decision may be deemed unjustifiable, provided the decision has affected the outcome of the case.

A common factor between *Belgor* and the Court of Appeal judgments is that the court's assessments of whether the arbitral tribunals' procedural decisions were unjustifiable concerned solely decisions that in some way limited the challenging

12. SOU 2015:37, 132.
13. Govt. Bill 2017/18:257, 50.
14. *See* Finn Madsen, *The Challenges of the Arbitral Awards in the Gas Sales and Gas Transit Arbitrations in Stockholm, Sweden*, Juridisk Tidskrift 2019/20, at 944.

party's right to an equal opportunity to present its case. In addition to *Belgor*, the term unjustifiable has been applied as part of the assessment of the following issues:

- Whether an arbitrator's decision to refuse the challenging party's request to reopen the case in order to give the challenging party an opportunity to comment on a statement made by the counterparty during the final remarks constituted a procedural error under the first paragraph of section 34(7) of the Act.[15]
- Whether the challenging party's right to present its case was unduly restricted due to the arbitral tribunal's decision to grant the opposing party an extension of time, which led to new facts being relied upon at a late stage of the proceedings.[16]
- Whether the arbitral tribunal's decision to hold a virtual hearing over the challenging party's objection constituted a restriction of the challenging party's right to present its case, which was contrary to the second paragraph of section 33 or the first paragraph of section 34(7) of the Act.[17]

In conclusion, the scope of the term unjustifiable is wider than what can be deduced from the Belgor case. However, it may also be concluded that the applicability of the term is limited to errors resulting from an erroneous assessment or a balancing of the parties' interests made by the arbitral tribunal.

[B] What Does the Term "Unjustifiable" Mean? What Circumstances Are Relevant to the Interpretation of the Term?

[1] The Belgor *Case*

The term "unjustifiable" was introduced by the Supreme Court in paragraph 40 of the *Belgor* case. The Supreme Court stated that precedents concerning Article V(1)(b) of the New York Convention are of relevance in the assessment of whether an arbitral tribunal's decision should be deemed to be unjustifiable.[18] The Supreme Court specifically referred to (paragraph 40) the *Robot Grader* case,[19] paragraphs 15-17:

15. Svea Court of Appeal judgment dated June 10, 2021 in Case No. T 13364-19, *Hans L v. The Partners of BDO*.
16. Svea Court of Appeal judgment dated October 8, 2021 in Case No. T 8181-19, *GTB Transgaz Belarus v. Energoprojekt Oprema a.d. Beograd*.
17. Svea Court of Appeal judgment dated June 30, 2022 in Case No. T 7158-20, ICA *Sverige AB v. Bergsala SDA AB*.
18. Article V.1 of the New York Convention reads: Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: […] (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.
19. *Robot Grader* (Swedish Supreme Court Case No. NJA 2018 p. 291) concerns the enforcement of a foreign arbitral award. The facts were, in brief, as follows: Belaya ptitsa requested arbitration in May 2015 against Robot Grader. On July 6, 2015, ICAC ordered Robot Grader to appoint an arbitrator within fifteen days and to submit a written response within thirty days. Robot Grader

> 15. Recognition and enforcement of an arbitral award may be refused if fundamental aspects of due process in international arbitration have been disregarded. The parties must be afforded a fair hearing before the arbitral tribunal ("due process of law").
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> 16. Due process includes the equal treatment of the parties, the transparency of the proceedings and the proceedings being reasonably foreseeable to the parties. It is a fundamental requirement that the parties be given an opportunity to present their cases. This requirement is set out in the Model Law: "each party shall be given a full opportunity of presenting his case" (Article 18, UNCITRAL Model Law on International Commercial Arbitration, 1985) and in the UNCITRAL Arbitration Rules: "a reasonable opportunity of presenting its case" (Article 17, UNCITRAL Arbitration Rules, as revised in 2010). According to the Swedish Arbitration Act (Section 24, first paragraph), the parties must be given the right to present their cases to the extent necessary. This requires that a party is given the time and opportunity to present its case. The meaning of this requirement depends, to a great extent, on the circumstances of the case (*see*, for instance, UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 97).
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> 17. A party who claims that it was unable to present its case, bears the burden of proving this. Furthermore, the party must demonstrate that it has participated in the arbitration in good faith (cf. Article 25 of the Model Law, cf. also Section 24, third paragraph of the Swedish Arbitration Act).

It may be concluded from the reference in *Belgor* to Article V(1)(b) of the New York Convention that the meaning of the term "unjustifiable" is closely linked to the parties' right to due process.[20] In *Robot Grader*, the Supreme Court stated that due process includes, in addition to the equal treatment of the parties, that the arbitral proceedings are transparent and reasonably foreseeable to the parties and that the parties are given sufficient time and opportunity to present their cases. Furthermore, it may be concluded from the Supreme Court's references in *Robot Grader* to the UNCITRAL Model Law and to the UNCITRAL Arbitration Rules that international

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appointed an arbitrator but did not submit a response. On September 23, 2015, the arbitration panel summoned the parties to a hearing to be held on November 19, 2015. Robot Grader was requested to submit a response by November 1 at the latest. Robot Grader did not submit any response. The parties then announced their joint intention to settle. After the hearing was postponed a number of times, the parties informed the arbitral tribunal, during a hearing, that they were unable to reach a settlement. Belaya ptitsa requested that the arbitral tribunal immediately issue an award, while Robot Grader requested that the hearing be postponed in order to prepare a reply. The arbitral tribunal rejected Robot Grader's request. The tribunal stated that Robot Grader had had enough time to prepare its case and emphasized, in particular, that the company had not filed a reply. In an award issued on March 25, 2016, Robot Grader was ordered to pay compensation to Belaya ptitsa. Robot Grader opposed Belaya ptitsa's enforcement of the award. The Supreme Court found that Robot Grader had had reason to assume that the dispute would not be tried on the merits due to the ongoing settlement discussions. The Supreme Court found that the conditions had changed by the time Belaya ptitsa requested that the arbitral tribunal issue an award. The arbitral tribunal should, therefore, have given Robot Grader reasonable time to prepare a response and to submit evidence. The Supreme Court held that the arbitral tribunal had disregarded fundamental aspects of due process in international arbitration, which had led to Robot Grader having been deprived of its right to present its case. For these reasons, the award was not recognized or enforceable in Sweden.

20. *See* van den Berg, *The New York Convention of 1958*, Kluwer Law 1981, 296.

sources are of relevance in the assessment of whether, in a specific case, due process has been observed.

The following circumstances appear to have been of relevance in the Supreme Court's determination of whether the arbitral tribunal's decision to deny an extension of time was unjustifiable:[21] (i) Belgor had previously, at one occasion, been granted a time extension; (ii) the date for the final hearing had been decided jointly by the parties; (iii) Belgor's request for a further time extension was denied in order to avoid a postponement of the hearing; (iv) it was possible for Belgor to submit a supplement to the expert report at a later stage; and (v) the expert report was primarily of relevance to Belgor's counterclaim, which (if withdrawn) would not be covered by the *res judicata* of the award.

[2] The Svea Court of Appeal Judgments

In the *BDO* case, the Court of Appeal considered the arbitrator's decision to deny the challenging party's request to reopen the proceedings in order to allow the challenging party to comment on a statement given by the counterparty during the final remarks. It is clear from the Court of Appeal's judgment that the Court carried out a thorough analysis of the arbitrator's decision. According to the arbitrator, the remarks given during the closing statement constituted arguments in relation to the evidence relied upon by the challenging party. It is possible that the arbitrator concluded that it would not have had any impact on the outcome of the case if the challenging party had been given the opportunity to comment on the remarks. The Court of Appeal concluded that the circumstances did not justify a reopening of the proceedings. A determining factor in the Court of Appeal's conclusion appears to be that the statement made by Hans L during his final remarks did not include ultimate facts (Sw. "*rättsfakta*"). The Court of Appeal did not carry out any de novo assessment, instead basing its decision on the arbitrator's conclusion concerning the nature of Hans L's statement.

In the *Transgaz* case, the Court of Appeal stated that, when assessing whether an award should be set aside due to a procedural error by the arbitral tribunal, the Court's assessment of the case should, as a rule, focus on the arbitral tribunal's method and examine how the arbitral tribunal arrived at its decision rather than on the content of the decision. In the *Transgaz* case, one of the questions before the Court of Appeal was whether Transgaz's right to present its case had been unduly restricted and whether the principle of equal treatment had been disregarded when the arbitral tribunal granted the opposing party the right to submit a written statement at a late stage of the proceedings. The Court of Appeal noted that the arbitral tribunal had given Transgaz the opportunity, during the final hearing, to respond to the written statement and that Transgaz had, in fact, taken the opportunity to comment on it during the hearing. Furthermore, Transgaz had been given an opportunity to submit comments to the statement in writing after the conclusion of the final hearing.

21. Supreme Court Case No. NJA 2019 section 171 (*Belgor*), paras. 43-45.

In the *ICA* case, the Court of Appeal stated that an arbitral tribunal's decision to deny a party a physical hearing must be appropriate and that the arbitral tribunal should balance the party's right to present its case against the need for speed and efficiency in the proceedings. From an overall point of view, the arbitral tribunal's decision must not appear unjustifiable. The Court of Appeal specifically stated that the technology used during the hearing must enable sufficient communication. The practical consequence of the Court of Appeal's statement may be that the arbitral tribunal, prior to the hearing, must ensure that the tribunal's and the parties' technical equipment are in working order and that the parties have equal access to the necessary technical equipment.

In the ICA Case, the following circumstances appear to have been of relevance to the Court of Appeal's decision: (1) the timetable was approved by both parties; (2) the decision not to participate in the physical hearing was taken by ICA and the parties were not denied the right to participate in a hearing when ICA announced its intention, due to the COVID-19 pandemic, not to participate in the *physical* hearing; (3) the tribunal decided that both parties should participate in a virtual hearing; (4) at the time of the tribunal's decision, it was uncertain how long the pandemic would continue; (5) the circumstances invoked by ICA, in its request for a postponement of the physical hearing, did not constitute sufficient reason to conclude that there was an obstacle to the hearing; (6) the technical conditions during the hearing were acceptable; and (7) ICA's opportunity to present its evidence was not affected by the arbitral tribunal's decision.

[C] Summary

It is a common factor in *Belgor* and the three Court of Appeal cases that the courts reviewed the arbitral tribunals' method and the way the tribunals had arrived at their decisions. A second common factor in the four cases is that the courts assumed that arbitral tribunals are best placed to assess the circumstances of relevance to the procedural decision. The courts did not carry out any de novo examination of the issues at hand. It is possible that a de novo examination would have been carried out if the Courts had found that the arbitral tribunals' methods were not acceptable.[22]

As a second step, the courts examined the effect of the arbitral tribunal's decision on the challenging party's ability to present its case. The Court of Appeal took into account that the arbitral tribunals had taken measures to ensure that the restriction on the challenging party's right to present its case was as limited as possible. For example, in the *Transgaz* case, the Court of Appeal noted that the challenging party was given an

22. Cf. Stefan Lindskog, *Skiljeförfarande—en kommentar*, JUNO v 3 re the first paragraph of section 34(7), para. 5.1.3. According to Lindskog, if the arbitral tribunal's decision is unfounded and it concerns an issue that is essential for the parties right to present their claims, the court should make its own assessment of what decision the arbitral tribunal ought to have reached. Should the court come to a conclusion different than that of the arbitral tribunal, it may be assumed that a procedural error has been made. The arbitral tribunal's failure to provide reasoning for its decision may result in the tribunal's decision being deemed "unjustifiable."

opportunity to respond to the written statement, which the opposing party was permitted to submit at a late stage of the proceedings. In the *ICA* case, the Court of Appeal found that the challenging party's presentation of its evidence was not affected by the hearing being held virtually.

In all four cases, the courts balanced one party's right to present its case against the risk of delay in the proceedings. It may be of importance that the extent of the delay is difficult to foresee at the time of the arbitral tribunal's decision. For instance, in the *ICA* case, it was uncertain, at the time of the tribunal's decision, how long the COVID-19 pandemic would continue.

The *Belgor* case involved an international arbitration. In *Belgor*, the Supreme Court stated that the New York Convention and, by way of the *Robot Grader* case, Article 18 of the UNCITRAL Model Law and the UNCITRAL Arbitration Rules, are of relevance to the assessment of whether a decision by an arbitral tribunal should be deemed unjustifiable. Despite the numerous references to international sources, it may be argued that the term "unjustifiable" has the same scope and meaning in Swedish domestic arbitration as in international arbitration, as the Svea Court of Appeal has considered *Belgor* to be of relevance also in two Swedish domestic arbitrations.[23]

In conclusion, in their assessments of whether the arbitral tribunal's procedural decision may be deemed unjustifiable, the courts appear to have taken into account the following circumstances.

- Whether the reasons for the arbitral tribunal's decision were clearly recorded, well elaborated and reasoned.
- Whether the parties jointly agreed on a timetable for the proceedings.
- To what extent the challenging party's right to present its case was affected by the tribunal's decision.
- Whether the tribunal took measures to ensure that the restriction on the challenging party's right to present its case was as limited as possible.
- Whether an extensive delay would have occurred unless the challenging party's right to present its case was restricted.
- Whether the circumstances that caused a restriction on the challenging party's right to present its case were within the control of the challenging party.

§13.05 CONCLUDING REMARKS

In the concluding section, I will discuss whether the meaning of the term "unjustifiable" in relation to a party's right to present its case can be further specified.

According to the first paragraph of section 24 of the Act, the parties must be afforded the right to present their cases to the extent *necessary*. This entails a

23. Cf. Lindskog, *Skiljeförfarande—en kommentar*, JUNO v 3, re section 34 p. 7, para. 5.2.1. Stefan Lindskog states that the reference to the New York Convention is of limited relevance to Swedish domestic arbitrations.

limitation.[24] However, if a procedural decision made by an arbitral tribunal is clearly motivated by a wish to avoid an extensive delay, can it still be deemed unjustifiable? Is there a core aspect of a party's right to present its case that cannot be limited regardless of the consequences for the timeliness and efficiency of the arbitral proceedings?

According to Matti S. Kurkela och Santtu Turunen, a party's right to present its case, as expressed in Article 18 of the UNCITRAL Model Law,[25] includes the following elements:

(1) the right to receive all information contained in submissions and due notice of the initiation of the proceedings;
(2) full and simultaneous access with other parties and the panel to all communications, pleadings, arguments and testimony;
(3) the right to be present at all physical hearings and at hearings via the Internet or by means of teleconferencing or video conferencing;
(4) full access to all written documents, evidence and reports submitted in the proceedings by the parties, witnesses, experts, or third parties without undue delay;
(5) the right to submit claims and argue in support of them, to raise material and procedural defenses and objections, and to bring new claims and raise new defenses;
(6) the right to submit relevant documentary evidence in either defense or support of claims;
(7) the right to cross-examine witnesses and experts and other parties testifying in the proceedings (including reasonable time to prepare);
(8) the right to comment on any and all statements, comments, and communications, and reasonable time to elaborate on an answer to any of them;
(9) the right to introduce further evidence and testimony as may be necessary to fully elucidate and defend the party's position should new facts emerge or new claims be made;
(10) adequate notice of the closing of the proceedings must be given in ample time to allow the parties to fully develop their pleadings and exhaust their testimony.[26]

The requirement of equality and full opportunity to participate is perhaps the most fundamental role of due process and *ordre public*.[27] The right to be informed of

24. *See* Finn Madsen, *Commercial Arbitration in Sweden*, 5th ed., Jure Förlag, 2020, 270.
25. According to Art. 18 of the UNCITRAL Model Law, a party shall be awarded a full opportunity of presenting its case. The SCC Rules states that the parties shall be awarded an equal and reasonable opportunity whereas the first paragraph of section 24 of the Act affords the parties an opportunity to present their respective cases to the extent necessary. Finn Madsen states: "There is probably no material difference between the varying formulations as the opportunity to be heard is impliedly limited by considerations of reasonableness and fairness." Commercial Arbitration in Sweden, 5th edition, Jure Förlag, 2020, 269.
26. *See* Kurkela and Turunen, *Due Process in International Commercial Arbitration*, 2nd ed. 2010, Oxford University Press, 187-189.
27. *See ibid*., 189.

the fact that arbitral proceedings have been initiated and the right to be given a reasonable time to respond constitute the core of a party's right to present its case.[28] The equal right to access all written documentation and evidence submitted in the arbitration and the right to be present at all hearings stems from the communication principle, which is a fundamental element of a party's right to present its case.[29] It is difficult to imagine a situation where timeliness and efficiency in the proceedings would justify a restriction of the communication principle, particularly in light of access to modern technology.[30] I therefore respectfully submit that a procedural decision restricting the rights listed in points 1-4 and 10 above may be considered unjustifiable and result in the arbitral award being set aside, regardless of any delay that may ensue.[31]

However, timeliness is one of the criteria of a fair trial, and the tribunal must control the proceedings to guarantee it. As mentioned above, a party's right under the first paragraph of section 24 of the Act to present its case is not unlimited. I believe that the elements listed in points 5-9 above may be restricted by an arbitral tribunal in the interest of timeliness and efficiency. An important part of the arbitral tribunal's task is, therefore, preferably jointly with the parties and at the early stages of the proceedings, to set a time limit for the closing of the proceedings. In order to limit the risk that the parties' right to present their cases will be affected by the deadline, sufficient advance notice of the deadline and its legal consequences should be given. The tribunal may also reserve the right to extend the deadline if the circumstances so warrant. Furthermore, the deadline should not make it impossible to establish the originally alleged relevant facts unless sufficient opportunity has been given to the parties to bring evidence and they have failed to do so for no sound reason.[32]

A party's right to present its case is diversified and complex. The conflict between a party's right to present its case and the timeliness of the proceedings is one of the most difficult problems in the arbitral tribunal's case management. It follows from *Belgor* and the Court of Appeal cases reviewed above that an arbitral tribunal, in order to ensure, to the extent possible, that the award will be final and binding, should ask itself two questions when faced with a situation where a party's right to present its case may need to be restricted for the sake of timeliness and efficiency. First, the arbitral tribunal should consider what aspect of that right the procedural decision would affect.

28. Cf. Swedish Supreme Court Case NJA 2010 p. 219.
29. Section 24 second paragraph of the Act.
30. *See* Lars Heuman, *Skiljemannarätt*, 1st ed., 1999, Norstedts Juridik, 650.
31. A party who, despite having received proper notification, refuses to participate in the arbitration is of course a different matter. According to the third paragraph of section 24(3) of the Act, if a party has been afforded an opportunity to present its case but has failed to avail itself of this opportunity without valid reason, the arbitrators may determine the dispute based on the material presented to them. Furthermore, a party should not be permitted to disrupt the efficient conduct of the proceedings by calling for a meeting at a late stage. According to the preparatory works, the arbitrators should be able to request that the parties call for an oral hearing within a particular period of time, failing which they will be deemed to have impliedly waived such right; *see* Govt. Bill 1998/99:35, 227.
32. *See* Kurkela and Turunen, *Due Process in International Commercial Arbitration*, 2nd ed., 2010, Oxford University Press, 195.

Second, if the arbitral tribunal finds that a restriction of the party's right is justified, the arbitral tribunal should ensure that the restriction is as limited as possible and that the arbitral tribunal thoroughly records the reasoning underlying its decision.