CHAPTER 1

Swedish Arbitration-Related Case Law 2023-2024

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§1.01 INTRODUCTION

This chapter will account for court cases relevant to arbitration law from the Swedish Supreme Court and Swedish courts of appeal from 1 May 2023 to 30 April 2024. It does not purport to be exhaustive; the aim is to highlight cases that can be assumed of interest to a non-Swedish reader.

§1.02 BACKGROUND

The Swedish Arbitration Act of 1999[1] (the 'Act') applies to all arbitration proceedings seated in Sweden, whether the parties have any connection to Sweden or not.[2] The Act also sets out, incorporating the 1958 New York Convention, the requirements for foreign arbitral awards to be recognized and enforced in Sweden.[3]

Sweden has a three-tier court system: district courts, six regional courts of appeal and the Supreme Court. However, district courts are only rarely involved in arbitration cases since the appellate courts are courts of first instance for invalidity and set-aside cases, as well as for recognition and enforcement cases.

A Swedish arbitral award can be *declared invalid* if it determines an issue which under Swedish law cannot be decided by arbitrators or if the award, or the manner in

1. Lagen (1999:116) om skiljeförfarande, as amended 1 Mar. 2019.
2. The Act, s. 46.
3. The Act, ss 52 et seq.

which it came about, is clearly incompatible with the basic principles of the Swedish legal system, i.e., *ordre public*.[4]

An arbitral award can be *set aside* (wholly or partially) at the request of a party, *inter alia*, when the arbitrators have exceeded their mandate and when, without fault of the party, an irregularity has occurred in the course of the proceedings which probably influenced the outcome of the case.[5]

An action to invalidate or set aside an arbitration award shall be considered by the Court of Appeal within whose district the arbitral proceedings were seated.[6] The Court of Appeal's permission is required in order to appeal its judgment.[7] Such leave to appeal is denied in the large majority of cases. For the case to be tried by the Supreme Court, leave is also required from that Court.[8]

Historically, invalidity and set-aside actions have very rarely been successful. A statistical survey from 1 January 2004 to 31 May 2014 shows that seven arbitral awards were set aside pursuant to section 34 of the Act, while one award was declared invalid pursuant to section 33 of the Act, equal to only 6% of all decided cases.[9]

In the period covered by this chapter, two awards were declared invalid; none was set aside. Both invalidity cases concerned arbitration proceedings based on the dispute resolution clause in section 26 of the Energy Charter Treaty.

§1.03 *KB COMPONENTS PLASTUNION AB V. HUSQVARNA AB*

In NJA 2023 p. 437 ('Husqvarnas skiljeavtal'),[10] the Supreme Court found that an arbitration clause in a frame agreement covered a later call-off agreement under the frame agreement.

In 2007, Husqvarna and KB Components Plastunion AB ('KB Plastunion') entered into a supply agreement regarding future call-offs made by Husqvarna. The terms of the supply agreement applied to purchases of products delivered by KB Plastunion to Husqvarna in accordance with purchase orders submitted by Husqvarna. The supply agreement contained an arbitration clause pursuant to which disputes 'arising out of or in connection with this Agreement or Purchase Order' shall be settled by arbitration.

4. The Act, s. 33. In addition, under this provision, an award is invalid if it does not fulfil the Act's requirements with regard to written form and signature.
5. The Act, s. 34(1), items 3 and 7. Section 34 provides for five other grounds for setting aside an arbitral award, but the two mentioned are those most frequently invoked in set-aside proceedings.
6. The Act, s. 43(1). The large majority of invalidity and set-aside proceedings are brought before the Svea Court of Appeal. The reason for this is that most Swedish arbitrations are seated in Stockholm.
7. The Act, s. 43(2), which provides that leave to appeal shall be granted 'where it is of importance, as a matter of precedent, that the appeal be considered by the Supreme Court'.
8. The Act, s. 43(2). Such requirement was introduced in an amendment to the Act which entered into force on 1 Mar. 2019.
9. Översyn av lagen om skiljeförfarande ('Review of the arbitration act'), SOU 2015:37, p. 79.
10. *KB Components Plastunion AB v. Husqvarna AB*, decision by the Supreme Court on 17 May 2023 in Case No. Ö 4116-22.

KB Plastunion initiated court proceedings against Husqvarna for payment of products delivered in 2020 pursuant to prior purchase orders. Husqvarna objected to the court's jurisdiction, stating that the dispute should be settled by arbitration. Both the District Court and the Court of Appeal found in favour of Husqvarna and dismissed the case.

The Supreme Court came to the same conclusion. It stated, *inter alia*, the following. The description of the legal relationship established by the parties through a frame agreement can be sufficiently precise (Sw. 'tillräckligt konkretiserad') for an arbitration agreement included therein to cover both disputes concerning the frame agreement itself and subsequent call-off agreements and thus satisfying the requirement in section 1 of the Act that an arbitration agreement 'may relate to future disputes pertaining to a legal relationship specified in the agreement'. The Supreme Court added that it does not follow from section 1 of the Act that an arbitration agreement can only apply to agreements already entered into.

'Husqvarnas skiljeavtal' has been the subject of debate in the legal literature, with authors calling into question whether the Supreme Court, by its decision, has changed the position taken in the landmark 2019 *Belgor* case (NJA 2019 p. 171).[11] This has been disputed by former Supreme Court justice Lars Edlund, one of the justices deciding the *Belgor* case.[12]

In my opinion 'Husqvarnas skiljeavtal' does not limit or change in any way the Belgor precedent.

§1.04 *IRENE LARSSON V. NAKED JUICEBAR AB*

The issue before the Supreme Court in the NJA 2023 p. 1067[13] was whether the cost provisions in an arbitral award rendered under the expedited SCC Rules were enforceable. The sole arbitrator had ruled that Irene Larsson, as between the parties, was liable for the fees of the arbitrator and the Stockholm Chamber of Commerce (SCC).

The enforcement authority (Kronofogden) decided to accept the award as the basis for collecting those fees from Irene Larsson. She appealed that decision to the Nacka district Court. The Court found that since the award contained no explicit order for Irene Larsson to pay Naked Juicebar AB, it was not enforceable in that regard. On appeal, the Svea Court of Appeal found to the contrary, as did the Supreme Court. The Supreme Court held that the arbitral award contained a sufficiently clear obligation for Irene Larsson to compensate Naked Juicebar AB for its arbitration costs. Therefore, the cost award could be enforced.

11. Jacob Frank, Svensk Juristtidning 2023 p. 623, '"Husqvarnas skiljeavtal" och tolkningsprinciper för skiljeavtal – har pendeln svängt igen?' and Lars Heuman, Juridisk Tidskrift 2023-2024 p. 463: 'Skiljemäns behörighet att pröva tvister om tilläggsavtal. Relevanta regler och faktorer.'
12. Lars Edlund, Svensk Juristtidning 2024 p. 538: 'En kommentar till "Husqvarnas skiljeavtal" NJA 2023 s. 437. Jacob Frank has replied thereto, Svensk Juristtidning 2024 p. 543: '"Husqvarnas skiljeavtal" – replik till en kommentar.'
13. *Irene Larsson v. Naked Juicebar AB*, decision by the Supreme Court on 27 Dec. 2023 in Case No. Ä 2885-23.

§1.05 *KINGDOM OF SPAIN V. TRIODOS SICAV II*

The Energy Charter Treaty (ECT) is an international agreement that establishes a multilateral framework for cross-border cooperation in the energy industry. It is an investment protection agreement.

Section 26 of the ECT contains a dispute resolution clause which, *inter alia*, refers to arbitration pursuant to the SCC Rules.

TRIODOS SICAV II (Triodos) is a venture capital fund incorporated in Luxemburg. During 2008-2010, Triodos made four investments in the Spanish energy market.

Spain and Luxembourg are parties to the ECT.

In 2017, Triodos requested arbitration against Spain pursuant to the SCC Rules.

In the subsequent arbitral award rendered in 2022, the tribunal found that Spain had breached Article 10.1 of the ECT and Spain was ordered to pay damages.

The same year Spain initiated proceedings before the Svea Court of Appeal, requesting that the award be declared invalid or set aside.[14]

One of Spain's grounds for invalidity was that the award, or the manner in which it came about, was clearly incompatible with the basic principles of the Swedish legal system (public policy, *ordre public*). Spain referred to the judgments by the European Court of Justice (CJEU) in Achmea,[15] Komstroy[16] and PL Holdings.[17]

With reference to such judgments and the Swedish Supreme Court's judgment in PL Holdings,[18] the Svea Court found that the 2022 arbitral award was invalid; to uphold it would be incompatible with basic principles of EU law and, thus, Swedish law.[19] The Court did not grant leave to appeal to the Supreme Court.

§1.06 *FESTORINO INVEST LIMITED ET AL. V. REPUBLIC OF POLAND*

Festorino Invest Limited and four other investors owned all the shares of the Polish company Blue Gas Holding, which conducted business in the Polish energy sector in the 2010s. Four of the investors had their seats in or were citizens of EU Member States. One of the investors was a Swiss citizen residing in Switzerland.

In 2018, the investors initiated arbitration proceedings under the SCC Rules with reference to section 26 of the ECT and claimed that Poland had acted in breach of the ECT.

In the arbitration proceedings, Poland objected to the tribunal's jurisdiction, referring to case law from the CJEU, i.e., Achmea.

14. Svea Court of Appeal Case No. T 15200-22.
15. Judgment by the CJEU on 6 Mar. 2018, *Slovak Republic v. Achmea BV*, Case No. C-284/16.
16. Judgment by the CJEU on 2 Sep. 2021, *Republic of Moldova v. Komstroy LLC*, Case No. C-741/19.
17. Judgment by the CJEU on 26 Oct. 2022, *Republic of Poland v. PL Holdings Sarl*, Case No. C-109/20.
18. Judgment by the Supreme Court on 14 Dec. 2022, NJA 2022 p. 965.
19. Judgment by the Svea Court of Appeal on 27 Mar. 2024 in Case No. T 15200-22.

In a 2021 award, the arbitral tribunal found that it had jurisdiction but found against the investors on substance and ordered the investors to bear the costs of the proceedings.

The same year, the investors initiated proceedings before the Svea Court of Appeal, requesting that the award be declared invalid or set aside.[20]

In the proceedings before the Svea Court, Poland left it to the Court to decide whether the arbitral award was invalid between Poland and the four EU investors but objected to the cost decisions contained therein being declared invalid, as well as to the award being invalidated in relation to the non-EU investor.

With reference to Achmea, Komstroy, PL Holdings and the Swedish Supreme Court's judgment in PL Holdings, the Svea Court found that the 2021 arbitral award was incompatible with basic principles of Swedish law and therefore invalid between Poland and the four EU investors, including in the cost part.[21]

With regard to the non-EU investor, the Svea Court found that an award can be invalid only in part but concluded that this was not the case here due to the reason for the invalidity (procedural public policy, *ordre public*).

Accordingly, the 2021 award was declared invalid in its entirety.

The Court granted the right to appeal to the Supreme Court. At the time of writing, the Supreme Court has not yet decided on whether to take the case.

20. Svea Court of Appeal Case No. T 12646-21.
21. Judgment by the Svea Court of Appeal on 20 Dec. 2023 in Case No. T 12646-21.