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In March 2019, the Swedish Supreme Court repealed the decision of the lower court to set aside an award rendered under the Rules of the Stockholm Chamber of Commerce. The Supreme Court applied a broad interpretation of the arbitration agreement, holding that the starting point for the court's review should be that the tribunal's decisions on jurisdiction and procedural issues are correct, thus establishing high threshold for the annulment of arbitral awards under Swedish law.

In the *Belgor* case, the Supreme Court was faced with several fundamental arbitration law issues.[1] The case arose out of a dispute between the Belarusian Joint Stock Company Belgorkhimprom ('Belgor') and the Turkish company Koca Inșaat Sanayi Ihracat Anonim Șirketi ('Koca'). In 2011, the parties entered into a construction contract under which the respondent (Koca) was to perform construction works in

Turkmenistan. The agreement included an arbitration clause referring to the Stockholm Chamber of Commerce (SCC) Rules. The parties subsequently entered into an additional work agreement under which the respondent was to perform additional works. The additional work agreement included a dispute clause referring to the 'Minsk economic court'. After Belgor had revoked the construction contract, Koca initiated SCC arbitration requesting that Belgor be ordered to pay damages of approximately USD 31 million.

In the award of 3 April 2015, which covered works under the construction contract as well as the additional work agreement, the SCC tribunal ordered Belgor to pay approximately USD 9 million to Koca. Belgor requested that the Svea Court of Appeal set aside the award on the basis that: (1) the tribunal had decided on issues that were not covered by a valid arbitration agreement i.e. the additional works (scope of the arbitration agreement); (2) the tribunal had omitted to try a disputed issue (*infra petita*); (3) the arbitral tribunal had not allowed Belgor to properly present its case and granted damages to Koca without any supporting evidence (lack of due process); and (4) the arbitral tribunal made a procedural error by granting the counterclaim without any supporting evidence.

In its judgment of 31 October 2017, the Svea Court of Appeal annulled parts of the award on the first two grounds and limited Belgor's payment obligation to approximately USD 6.5 million.[2] Koca appealed to the Swedish Supreme Court, which by its judgment of 20 March 2019, repealed the lower court's judgment and declared that there was no ground for setting aside the award. This judgment will likely be considered as defining arbitration case law in Sweden for the years to come.

1. Determining the scope of the arbitration agreement

The arbitral tribunal determined claims under both the main contract (which included an arbitration clause) and a subsequent contract (which did not include an arbitration clause but a reference to the 'Minsk economic court'). In determining its jurisdiction, the arbitral tribunal held that the reference to the Minsk economic court granted the parties a right, but not an obligation, to refer disputes to such court. The arbitral tribunal therefore concluded that the disputes over the additional works were covered by the arbitration agreement in the construction contract and that it was mandated to try claims under that agreement.

In the setting aside proceedings, Belgor argued that the dispute resolution clause in the additional work agreement excluded the arbitral tribunal's jurisdiction over the additional works and that the tribunal was thus not mandated to decide those claims.

The Supreme Court first noted that the scope of the arbitration agreement is defined by the legal relationship as set out in the agreement and that customary principles for contract interpretation apply:

> In instances where the wording provides for differing interpretations and other relevant interpretation data give no guidance, it is natural to start with the view that the arbitration agreement should fulfil a sensible function and serve as a reasonable set of rules for the parties' respective interests.[3]

In light of these principles, the Supreme Court concluded that it should be presumed that (i) the parties' common intention when choosing arbitration was that disputes be settled quickly and in a coherent procedure, and (ii) the parties have intended that disputes within their relationship be settled in the same forum, as it otherwise would trigger delays, higher costs and inconsistent rulings on connected issues.

Under section 1 of the Swedish Arbitration Act, an arbitration agreement should relate to a specified *legal relationship*. In its judgment, the Supreme Court clarified that this term should be interpreted in a manner consistent with how the term 'defined legal relationship' in Article II(1) of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') is understood.[4] The Supreme Court noted that international case law and legal literature support a broad interpretation of the term so that the arbitration agreement can also cover issues not strictly related to the main contract, such as those relating to subsequent contracts between the parties. This is a clarification, and possibly a shift, of Swedish law in a more international direction, since it now gives broader application to the concept of 'legal relationship'.

The Supreme Court also made clear that considerable weight should be given to the tribunal's jurisdictional decision as the tribunal is typically best-suited to determine issues of its own mandate. The tribunal's interpretation and assessment should therefore be presumed to be accurate and it is thus for the party contesting jurisdiction to establish before the court that the arbitral tribunal's decision is incorrect, rather than for the court to make a new full and independent assessment with regard to jurisdiction.

On that basis, the Supreme Court held that the subsequent agreement was covered by the arbitration agreement included in the main construction contract and that the reference to the Minsk economic court in the additional work agreement did not exclude jurisdiction of the tribunal.

2. Omission by the arbitral tribunal to try a disputed fact

As a second basis for annulment, Belgor asserted that the tribunal omitted to decide a disputed question of fact by assuming that the parties had agreed on a start date for the interest to be awarded to Koca, when Belgor had not agreed to such date.

The Supreme Court held that the arbitral tribunal had mistakenly assumed that the parties agreed on the start date and that Belgor had not caused or contributed to the tribunal's mistake. However, under Swedish law a procedural error must have affected the outcome of the case to be a ground for annulment (i.e. causation between the error and the outcome of the case must be established). The Supreme Court further held that the error should be significant and the effect of such error must be of reasonable importance to the complaining party.

The Supreme Court concluded that the tribunal's error could not be deemed to have been of reasonable importance to Belgor as the effect of the error was only limited to a number of days of interest. The error did not have sufficient influence on the outcome of the case and did not constitute a ground for annulment.

3. Lack of due process

As a third basis, Belgor argued that the tribunal had not afforded the company *reasonable opportunity to present its case*, by refusing a request for extension of time to submit an expert report and a request that the tribunal appoint an independent expert.

The Supreme Court began by emphasising that the tribunal is most qualified to determine whether a request for extension of time should be granted or refused. The Supreme Court then ruled that a refusal to extend a time limit can only be a ground for annulment if the arbitral tribunal's decision is deemed *indefensible* and noted that '[i]n this assessment, regard should be given to the case-law which exists concerning article V(1)(b) of the New York Convention'.[5]

The Supreme Court further noted that to constitute ground for annulment, the requesting party must not have caused or contributed to its delay. The request for extension of time must refer to circumstances showing that (i) the requesting party was unable to present its case in time, (ii) such request is due to circumstances beyond the party's control, and (iii) there are no clearly acceptable alternatives to present the case within the agreed schedule.

With regard to the *request for appointment of an expert by the arbitral tribunal*, the Supreme Court concluded that a refusal of such request cannot be ground for annulment unless the arbitration agreement requires a tribunal-appointed expert.

4. Lack of supporting evidence is not a ground for annulment

Belgor further asserted that the tribunal made a procedural error by granting the counterclaim without any supporting evidence. The Supreme Court pointed out that the tribunal's assessment of the burden of proof and the evidentiary requirements is part of the assessment of facts (and not a procedural issue).[6] Accordingly, the Supreme Court held that, even if the arbitral tribunal had made the alleged errors, this was not a ground for annulment.

1

Judgment of the Swedish Supreme Court on 20 March 2019 in case no. T 5437-17, available at https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=3611426&propId=1578.

2

Case no. T 6247-17 available at https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=3284585&propId=1578.

3

Ibid. at p. 6, item 13 (free translation).

4

Art. II(1) of the New York Convention provides: 'Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration'.

5

Art. V(1)b of the New York Convention provides: '1. 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;

6

See for example the Swedish Supreme Court's judgment NJA 2012 p. 790.