

Arbitrators' excess of mandate and procedural irregularities – A study based on challenged awards between 1999 and 2009

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Summary

The application of the challenge and invalidity regulations of the Swedish Arbitration Act (Sw. *lag om skiljeförfarande*) has a considerable practical value for parties and arbitrators in future, pending and terminated arbitrations; but it is also in the interest of the legislator that this method of dispute resolution fulfils its purpose. For instance, the regulations affect which issues the arbitrators are allowed to examine as well as to what extent arbitral awards remain final or whether an award should be set aside as a consequence of an irregularity. On the one hand, a too restrictive application of the regulations may entail undesired consequences from a perspective of legal certainty, if awards with significant irregularities remain valid and enforceable. On the other hand, if awards are set aside too easily, it will undermine many of the advantages that follow from choosing arbitration instead of litigation.

A review of all challenged awards in Sweden between 1999 and 2009 shows a number of interesting issues. The first conclusion is that the vast majority (85 percent) of the cases regarding challenge are examined by the Svea Court of Appeal (Sw. *Svea hovrätt*). That, in combination with the fact that only a few cases have been judged by the Supreme Court, makes the Svea Court of Appeal the primary court in terms of establishing precedence for setting aside arbitral awards. In contrary to the legislator's view as expressed in the preparatory work, it is motivated *de lege ferenda* to make the Svea Court of Appeal the exclusive forum for challenge cases, as is already the case when it comes to enforcement of foreign awards. Furthermore, the study shows that a considerable number of the 89 challenge cases examined on its merits, were directly dismissed by the court as being unfounded. However, the negative consequences of this are probably limited and specific measures to restrain unfounded cases should not be necessary.

Excluding evidently unfounded cases, the review of challenged awards signifies that the courts generally have a judicious approach to setting aside awards. The restrictive position is manifest, but in a number of cases where formal irregularities have been found, the challenge has been granted. When it comes to the distribution between the different grounds for invalidity and challenge, it is clear that excess of mandate (34 § first paragraph second item) and procedural irregularities (34 § first paragraph sixth item) are the practical most important; these grounds are without doubt the most raised, both in terms of the total number of cases and cases that have been allowed.

A closer review of case law regarding excess of mandate and procedural irregularities implies that the courts demonstrate a significant respect for party autonomy but have a much more restrictive approach to setting aside awards in case of other types of

irregularities. Case law indicates that it is of great importance that the arbitrators comply with the parties' instructions and within the framework of the examination, which is decided by how the parties formulate and conduct their case. In these cases, the award can be set aside even though the arbitrators' excess of their mandate is not extensive. However, as long as the arbitrators comply with the mandate as defined by the parties, they have a considerable liberty when they conduct their examination. According to case law, other kinds of irregularities will merely result in an award being set aside if the irregularities are significant and procedural.

According to the Swedish Arbitration Act, a procedural irregularity is a ground for setting aside an award only if it is probable that the irregularity has influenced the outcome of the case. A corresponding explicit prerequisite of influence does not exist for excess of mandate. However, with support of recent case law from the Svea Court of Appeal and of doctrine, the study shows that there most likely is an implicit prerequisite of influence. This implicit prerequisite appears to be less strict than the formulation in the legislation and is defined negatively; an award shall not be set aside if it is inconceivable that the excess of mandate has influenced the outcome of the case. The existence of such a prerequisite coheres with the intent of the legislator. Keeping in mind that this ground for challenging awards is of particular importance, there is a demand for clarifying the supposed existence and scope of an implicit prerequisite of influence, either through legislation or case law.

It should be stressed that the Swedish rules of challenging awards are generally well functioning by posing as a safe-guard if serious irregularities have taken place, at the same time without setting aside the principle of party autonomy and the principle of finality of arbitral awards.