

Kluwer Arbitration Blog

Does Kibar v. Gazprom Change the Swedish Approach to Set Aside Proceedings?

Jeremy Zell · Tuesday, December 28th, 2021

On 1 December 2021, the [Svea Court of Appeal in Stockholm](#) rejected Kibar Enerji Anonim Sirketi's request to set aside an arbitral award in a dispute with Gazprom Export LLC over contract pricing of natural gas. Kibar alleged that the arbitral tribunal had exceeded its mandate and had also committed a procedural error when issuing its final award. As discussed below, the court's holding should be viewed as a continuation of the Swedish courts' established approach to questions of excess of mandate and procedural error under Section 34 of the [Swedish Arbitration Act](#). At the same time, the court's ruling has the potential to, perhaps inadvertently, modify that existing approach.

Background to the Decision: Kibar Enerji Anonim Sirketi v. Gazprom Export LLC, T 7865-19 (Svea Court of Appeal, 1 December 2021)

In 2012, Kibar agreed to purchase natural gas from Gazprom. The parties agreed that the contract price would be determined by a set formula. The contract also allowed for the renegotiation of the contract price at the request of either party. In the event the parties could not agree to a new price, the matter could be submitted to arbitration.

Gazprom requested that the contract price be increased in December 2015. The parties were unable to agree to the adjustment, so Gazprom requested arbitration at the Stockholm Chamber of Commerce in February 2017. The arbitration was seated in Sweden.

Gazprom requested that the tribunal increase the contract price by: 1) removing a previously granted discount from the contract formula; and 2) increasing the base price of the contract formula. The tribunal granted Gazprom's request to remove the discount, but rejected its request to increase the formula's base price.

Kibar filed a challenge with the Svea Court of Appeal in Stockholm arguing that the tribunal had exceeded its mandate and also committed a procedural error. Both are mandatory grounds for set-aside under Section 34 of the SAA.

Kibar argued that, during the course of the arbitration, Gazprom had framed its request for relief as an "all or nothing" proposition. The tribunal could only adjust the contract price if Gazprom proved both that the discount should be eliminated and the base price should be increased. The

tribunal was not empowered to increase the price on the basis of only one of the elements. When it granted an increase in the contract price by removing the discount only, the tribunal granted relief other than what Gazprom had requested and, thus, exceeded its mandate.

Additionally, Kibar argued that it was not until the final hearing that Gazprom first claimed that the two elements could be accepted jointly or separately. Therefore, the tribunal committed a procedural error by allowing Gazprom to amend its claim at too late a stage in the proceedings. This denied Kibar sufficient opportunity to present its case.

Gazprom countered that it had always argued that the two elements were “self-standing and separable” bases that justified an increase in the contract price. In any event, Kibar had sufficient opportunity to present its case during the final hearing and in the post hearing briefs.

The Court’s Reasoning

The Svea Court of Appeal rejected Kibar’s challenge and upheld the arbitral award. The court began its analysis by defining excess of mandate and procedural error under Swedish law. In its view, the question of whether a tribunal has exceeded its mandate is answered by examining whether the tribunal stays within the “boundaries of the tribunal’s material inquiry” into the issues presented to it. Moreover, the court found that, under the circumstances, the question of procedural error turned on whether a party was given sufficient opportunity to present its case.

The court found that Gazprom had framed its claim in a way as to allow the tribunal to consider each element separately. Among other things, the court found that Gazprom’s request for relief also included a request for “such additional and other relief that may be just.” This general request made it clear that the elements underlying Gazprom’s request for relief were separable. Consequently, the tribunal was within its mandate to grant a partial price increase based on only one of the elements. Similarly, the tribunal did not commit a procedural error, because Gazprom had not amended its claim.

The court ended its analysis by noting that, even if the tribunal had committed a procedural error by allowing Gazprom to amend its claim, that error would not have affected the outcome of the case. The court stated that Kibar would have had the opportunity to develop its rebuttal during final hearing and in the post hearing briefs. Thus, the award would still be enforceable despite the tribunal’s error.

Some Key Takeaways from the Ruling

The *Kibar* ruling is consistent with the existing approach to analyzing questions of excess of mandate and procedural error under Swedish law. For example, the court used the nature of Gazprom’s request for relief as the method for determining the tribunal’s mandate. In arbitrations seated in Sweden, the “boundaries” of the arbitrator’s mandate are traditionally determined by how the parties present their respective cases. Reviewing courts will determine the scope of the mandate by examining the claimant’s specific relief sought, the grounds and evidence that the claimant invokes to support its request for relief, as well as the grounds and evidence that the respondent invokes to rebut the request.

The ruling also reinforces the established principle under Swedish law that questions of procedural error are closely linked with the right to be heard. This does not mean that an arbitrator can only commit a procedural error by denying a party its right to be heard. Other circumstances than those presented in this case can constitute procedural error.

Furthermore, it is notable that *Kibar*'s challenge clearly distinguished the factual grounds for excess of mandate from the factual grounds for procedural error. The facts of the case lent themselves to such a clean distinction, but often parties and courts blend the two concepts together in Swedish challenge proceedings. When this happens, a challenging party will rely on the same facts to claim that the tribunal exceeded its mandate or, alternatively, committed a procedural error. The reason for this is that, historically, the two grounds have been so conceptually intertwined that many sets of circumstances could be viewed through the lens of excess of mandate, procedural error, or even both.

Finally, and perhaps most importantly, the court's ruling potentially opens the door to a rethinking of, among other things, how the arbitrator's mandate is defined in Swedish arbitral proceedings and what constitutes a procedural error that affects the outcome of a case.

The court found that Gazprom had not amended its claim, and therefore, the tribunal had not committed a procedural error. But, in the final paragraph of its reasoning, the court opined—in *dicta*—that even if the court had committed a procedural error by allowing a late amendment, that error would not have affected the outcome of the case.

While the court may have made this observation in passing, its implications could potentially change the current understanding of excess of mandate and procedural error in Swedish law for at least two reasons.

First, the court implies that an arbitrator necessarily commits a procedural error by allowing a claim to be amended late in the proceedings. Even so, such an error does not necessarily lead to set aside. Rather, the question is whether the error affected the outcome of the case. In other words, if one accepts the court's reasoning, the denial of the right to be heard is not evidence of procedural error, but evidence that the error affected the outcome of the case. This then leaves open the question of what conduct actually constitutes procedural error.

Second, the method of framing the arbitrator's mandate under Swedish law may be significantly altered if an arbitrator is allowed to accept a late amendment to a party's claim. As mentioned above, the parties define the boundaries of the arbitrator's mandate by developing the elements of their case over the course of the arbitral proceedings. If an arbitrator allows one party to amend its claim at the final hearing, then the arbitrator's mandate necessarily expands to include the amended claim, which, in turn, diminishes the importance of how the parties chose to plead their respective cases before the final hearing. The decision to allow the late amendment would shift the power to define the arbitrator's mandate from the parties to the arbitrator.

It is not difficult to imagine scenarios in which the *Kibar* court's view of late amendments could run counter to the current understanding of mandate and procedural error in Swedish law. Arguably, however, it may be best to avoid entering the rabbit hole of hypotheticals and take the court's statement for what it most likely is: under the circumstances of the *Kibar* case (and that case only), any late amendment would have resulted in a procedural error that would not have affected the outcome of the case.

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This entry was posted on Tuesday, December 28th, 2021 at 8:08 am and is filed under [Procedural Error](#), [Set aside an arbitral award](#), [Set aside an international arbitral award](#), [Sweden](#), [Swedish Arbitration Act](#)

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