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To Only Draft Within the Lines: A Subtle Skill More Difficult to Master Than One Might Think

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To colour within the lines is something many of us pride ourselves to have mastered perhaps some time ago. Crossing the lines with a hasty movement may ruin an otherwise nice picture. Similarly, an otherwise good arbitration may be spoiled if the tribunal fails to stay within the lines drawn up by the parties. Like the picture, these lines may be thick and easy to follow, or they may be thin or barely visible. Sometimes, they may even be missing entirely, leaving the arbitrator in an awkward situation when drafting the award.

In two recent judgments, the Court of Appeal for Western Sweden turned the spotlight on some specific situations where arbitrators crossed the lines provided by the parties and exceeded their mandates. This post discusses these two cases and places them in the context of recent statistics on the frequency with which awards are set aside in Sweden due to excess of mandate.

Background of the Cases

In the first case (*Rolfs Flyg- & Bussresor v RK Travel case no. T 2710-22*, a case report of which has been published on Thomson Reuters Practical Law Arbitration, which is also accessible on Westerberg & Partners' web site), the Court concluded that the sole arbitrator had exceeded its mandate but upheld the award as it had not affected the outcome of the arbitration. The case concerned a contract dispute between two travel companies. The claimant had argued two alternative legal grounds to support why it was entitled to have some of its payments returned: firstly, that the overpayments constituted a debt, and secondly, under the principle of *condictio indebiti* (where a party is entitled to have amounts paid in error returned).

In the award, the arbitrator accepted the claimant's argument that a debt had been constituted but rejected the claim on the respondent's defence that the respondent had received the payments in good faith. However, in its reasoning, the arbitrator addressed the good faith defence under the heading *condictio indebiti* instead of the debt section.

The claimant challenged the award on the argument that the arbitrator had exceeded its mandate by assessing the respondent's defence under the wrong legal ground. The Court agreed and concluded that the arbitrator had exceeded its mandate. Nevertheless, the Court also noted that the respondent had raised a good faith defence with respect to the first legal ground as well. As the outcome of

these assessments was likely to have been the same, the Court ruled that the claimant had not proven that the error had affected the outcome of the award, which is a requirement to have an award set aside under Section 34 of the Swedish Arbitration Act. Thus, the Court upheld the award.

In the second case (*Link Norge A/S v Oxe Marine AB, case no T 1747-23*, a report on which is published on Thomson Reuters Practical Law Arbitration which is also accessible here), the Court partly set aside the award as it found that the arbitrator had awarded one party more than it had claimed. The arbitration concerned obligations under a distribution agreement, and both parties had claimed compensation for unpaid invoices. They had both contested the other party's claims and admitted paying parts of the claimed amounts.

In the award, Oxe Marine was awarded both the amount admitted by Link Norge and parts of the disputed amounts. However, the total awarded amount was higher than what Oxe Marine had sought (*ultra petita*). Link Norge challenged the award.

In the challenge before the Court, the Court found that Oxe Marine had submitted invoices for greater amounts than it had claimed and had not sufficiently specified how the sought amounts were calculated. The Court also noted that Link Norge had not specified how the admitted amounts related to Oxe Marine's invoices. In light of this, the Court found that the arbitrator had exceeded its mandate by awarding Oxe Marine more than it had claimed. It also noted that there was no support that the arbitrator had received mandate to award Oxe Marine greater amounts than what it had sought. Thus, the Court set aside the part of the award concerning Oxe Marine's claims. The parts concerning Link Norge's claims were upheld as they could be separated from the error. It is notable that the Court in this case granted leave to appeal to the Supreme Court, which it may do if it finds that the case raises issues where guidance from the Supreme Court would be of importance.

Takeaways from the Two Judgments

Both cases concern situations where a sole arbitrator failed to stay within the lines of the arbitration: in the first, by not strictly adhering to how the parties presented their arguments, and in the second, by going beyond the sought relief. In the first case, it is likely that the error was due to haste on the arbitrator's part, resulting in one argument ending up under the wrong heading. In the latter, the parties had not provided the arbitrator with the instructions needed to draft the award and the arbitrator tried to fill in the colours without the necessary lines. This was despite the fact that the arbitrator had made some efforts to instruct the parties to clarify their claims.

It may be added that it is stated in the preparatory works to the Swedish Arbitration Act (govt. bill 1998/99:35 pp. 142-144) that a court may take the international nature of the proceedings into account and that the scope of the arbitrators' mandate may be adjusted in accordance with the international standard. When deciding whether or not a tribunal in an international arbitration has exceeded its mandate, the Court may take into account the fact that neither the parties nor the arbitral tribunal are experts in all aspects of Swedish arbitration law. An arbitration may be considered international if one of the parties is foreign, but it is more likely to be considered so if both parties are foreign with international counsel and arbitrators. This is something the Court referred to in both of its judgments. While the first case was domestic, the second case involved a Swedish party and a Norwegian party, with a Finnish sole arbitrator. Considering that both parties

were represented by Swedish counsel, and that the arbitration took place in Sweden before the SCC, the Court found that the specific circumstances of the case showed that everyone involved was well-versed in the Swedish legal system. It may be added that the arbitrator also acts as counsel before Swedish courts.

While both cases highlight the importance of the arbitrator not going beyond the parties' submissions in the arbitration, the second is perhaps the more interesting of the two, as it serves as a reminder that an arbitrator cannot remain passive until it is time to draft the award. It is sometimes said that arbitrators in Sweden tend to adopt a relatively passive role compared to some other jurisdictions. While this may be true in some regards, for example when it comes to asking investigative questions to witnesses, it is generally not the case when it comes to understanding the parties' sought reliefs and legal basis for the parties' claims. As was relevant in the second case, it is part of the arbitrator's obligation *to make efforts* in asking questions so that ambiguities are clarified and that the arbitrator understands the parties' arguments and claims. This is to avoid misunderstandings and to ensure that the parties are not surprised when the award is handed down. In this respect, the second case effectively points out the importance of truly understanding the parties' positions, especially when it comes to admissions, before the arbitration is concluded. To continue the colouring analogy – a good arbitrator should preferably ask the subject a follow-up question such as "exactly what do you mean when you say you want it reddish?" instead of hoping to be as lucky or skilled as Mr Yeo.

Concluding Remarks

While arbitral awards are rarely set aside in Sweden, it has been found that excess of mandate is the most common basis for a successful challenge of an award. In a recently published study (available here) covering all award challenges in Sweden over the last two decades, it was found that only six percent (21 actions) of all challenges decided on the merits (336 in total) were fully or partially successful. Of the 21 successful actions, ten were set aside on the grounds of excess of mandate (three percent of all actions). The second most successful ground, with five successful challenges in the last two decades, was lack of a valid arbitration agreement.

A final takeaway from the two judgments is that the distinction between them nicely illustrates the fact that the challenge process in Sweden works as intended. An arbitral award should not be set aside on mere formalities if such formalities did not affect the outcome. However, when the outcome is affected – there needs to be some way to challenge a defective award. A different approach would risk to spoil the trust in arbitration institute as a preferred method of dispute resolution.

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